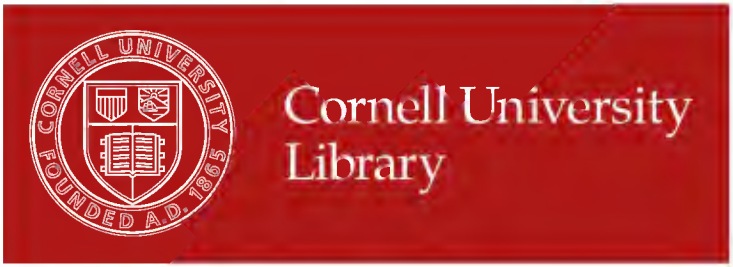
THE FREEDOM OF THE SEAS

HISTORICALLY TREATED

BY

SIR FRANCIS PIGGOTT, Kt.



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SIR FRANCIS PIGGOTT, KT.

Author of "The Armed Neutralities," &c.

CORRIGENDA

On p. 38, 2nd para., *for* 'French Memorandum (see pp. 29, 32)' *read* 'Prussian Answer to the Law Officers' Report (see p. 36)'

On p. 62, line 28, *for* 'President Jefferson' *read* 'Mr. Jefferson, the Secretary of State,'

Foot-note, *for* '1795' *read* '1799'

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PREFACE

THERE must be some fundamental principles governing the relations of belligerents and neutral merchants; they cannot be regulated by a series of rules which have all the appearance of being haphazard, unless some recognised principle underlies them. But, even when Congresses meet for the express purpose of arriving at an agreement as to the rules, we look in vain for some statement as to what this principle is. Meanwhile, many undigested theories are advanced, based on very doubtful hypotheses. Of these the foremost, which has taken hold of many international lawyers, is that neutral commerce with the belligerents ought not to be interfered with, but must be allowed to continue in war as in peace, with exception only in the case of contraband of war and trade with blockaded places. On this the alleged right, as distinguished from treaty agreement, rests that "free ships" make "free goods."

There is also much insistence on the doctrine that the rules of international law are based on the common practice of nations. If this means all nations, so great is the divergence in actual practice that few rules would survive. If it means the practice of many, or the majority of nations, then, in 1780, England would have been in a minority of one, and her supremacy at sea would have passed away. Yet there must be, and is, some test of right and wrong. It is to be discovered by a study of what nations did, as belligerents and neutrals, in time of war, and testing it by the motive which lay behind; for motive is more easily judged than action. The motives are written very plain in history: abundant war profits for the neutrals, essential assistance to the enemy. Belligerent action, whether it were the seizure of contraband cargoes or of ships running

blockade, or the larger operations of commerce-destroying, has always been based on the necessity of preventing that assistance reaching the enemy. The standing illustration is the incessant dispute between England and France during the two years which preceded the declaration of war in 1778, when the professed object of the Cabinet at Versailles was to assist the American Colonies in their rebellion.

The historical method is essential to the understanding of what, for want of a better term, is called "International Law"; and the object of this little book is to give in outline the story of the different periods when England's action at sea was challenged by combinations of the Neutral Powers.

F. T. P.

EDITORIAL NOTE

This treatise is confined to the historical side of the question, and avoids any discussion of its controversial aspects, except in so far as these form part of its history. It is issued to the public as supplying an indispensable preliminary to the understanding of present conditions and international difficulties.

G. W. PROTHERO.

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INTRODUCTORY

THE appropriation of the formula, the "Freedom of the Seas," by our late enemy necessitates an historical examination of its use by the enemies of Great Britain, and a renewed assertion of its true meaning. The enemy has adopted it as a comprehensive term, to deny the right of a belligerent to interfere with his free use of the sea in time of war.

For a belligerent to claim free navigation and commerce at the hands of his enemy, to assert that he is entitled to use the sea as freely in war as in peace, is to ignore the circumstances of war and practically to deny the right to fight upon the sea.

But when the neutral makes this claim, the question assumes a very different and a more serious aspect; for *his* assertion appears at first sight to be unanswerable. He is unconcerned with the war; *a priori*, therefore, he should not be affected by it, and should be allowed to continue in peaceful exercise of his rights of free navigation and commerce upon the sea. Yet this also ignores the circumstances and conditions of war; for, obviously, free navigation and free commerce would carry with it free intercourse with the enemy and raise the question how far this is consistent with neutrality.

In the historic disputes in which England's attitude at sea has been challenged, the neutral has put forward his claim in this simple fashion; he has hardly disguised the fact that his aim has been to maintain free

intercourse with the enemy. The only exceptions he has been willing to admit are trade in contraband and with blockaded ports. The issue is therefore very clearly defined, and it has not varied from the time it was first raised to the present day.

It must be obvious that it lies only with the neutrals to put forward this claim of free navigation. If the enemy has any right to claim it, it can only be (in the absence of a treaty) as a derivative from the neutral's right. The historical examination of the question will amply demonstrate the accuracy of this statement.

Our enemy sought at the outset to cloud the issue by confusing the Laws of War with what is popularly called "International Law," and did so with some success. It is suggested that the only sound way of treating the subject is to say that the relations of belligerent and belligerent are governed by the Laws of War; that "International Law" properly applies to the relations between belligerent and neutral States; and that the questions which commonly arise in connection with the "Freedom of the Seas," can only be accurately defined as the relations of belligerents and neutral merchants.

The point need not be laboured, but must be noticed in order to emphasise the importance of preserving an accurate nomenclature in the discussion. Confusion of meaning in the terms used has prevailed since the question was first debated, and the enemy has always availed himself of that confusion.

To make my meaning clear. The question whether it is legitimate in war to destroy the commerce of the enemy can only depend on the Laws of War; the point being whether the effect of this belligerent action does not so affect the civil population as to remove such action from legitimate warfare. The destruction of the enemy's trade with himself—his coasting trade, for example—could not be condemned on any other ground. But when we come to the enemy's trade with the neutrals another factor is introduced into the discussion; the question passes

from the sphere of the Laws of War, because other parties—the neutral merchants—are affected, who are unconcerned with the war. The issue then takes this form: whether those parties have commercial rights which are paramount to the right of the belligerent to annihilate his enemy. It is not easy to disentangle the two questions—Whether the neutral merchant has a right to trade with the enemy? Whether the enemy has a right to trade with the neutral merchant? The discussion of the principle "free ships free goods" is infected with this difficulty. But, war being what it is, in the absence of any support from the Laws of War, it is obvious that, if the enemy has any such right, it must be derived (in the absence of a treaty) from the right, if any, of the neutral merchant, and from the impossibility of severing the rights of the two parties to the contracts of which all commerce is composed.

The argument in favour of the enemy cannot be put higher than this: that his commerce cannot be interfered with, because the right of the neutral merchant would also be interfered with. And this argument is no stronger than its converse—the neutral merchant can have no right to trade with the enemy, because any rights which the enemy has are at the mercy of the belligerent.

The solution of the difficulty either way must depend on some sounder process of reasoning.

The position assumed by England may be stated very simply. Interference with neutral trade is justified whenever the premiss on which the neutral claim rests —unconcern with the war—is negatived by the facts. When the neutral has established relations with the enemy his claim of absolute right is vitiated. To this fundamental principle England's action has been at all times referable. It was not until the pressure of her power upon the sea became so great as practically to annihilate those relations that the neutrals had recourse to the formula "Freedom of the Seas" to destroy it. The enemy followed his lead. In

this sense and for this purpose the formula came into common use on the Continent from 1776 to 1782, at the time of the American War of Independence and the First Armed Neutrality. In this sense and for this purpose Bonaparte at the time of the Second Armed Neutrality, in 1800, adopted it as his own. This combination of neutral and enemy, their resentment at the action of the Power which used her supremacy at sea to interfere with their trading relations, led to her being called the "Tyrant of the Seas," an epithet based solely on the assumption that the use of the sea in peace continues unaltered in war.

Now, in the first place, war upon the sea must interfere with its free use. The quarrels of maritime nations are fought out upon the sea. There will be fighting wherever enemy ships are found (except in neutral territorial waters); and free navigation on the trade routes will be interrupted. Thus indirectly war diminishes the Freedom of the Seas.

War also prejudices it directly; and, quite apart from the familiar questions of blockade and contraband, free commerce is curtailed. This point must at the outset be made clear: that except indirectly, as just indicated, neutral trade with neutral is not interfered with, but remains "free." But it is obvious that neutral commerce alters its character directly an ultimate destination of the cargoes to the enemy is intended, and loses it altogether when it is commerce with the enemy. A new element has been introduced which entitles the belligerent to revise his admission that neutral commerce is free. This is invariably overlooked in all the statements of the case against England; interference with neutral trade with the enemy is treated as being in the same category as interference with purely neutral trade with neutral. The former might be completely destroyed, and yet genuine neutral commerce remain intact. It follows, therefore, that the measure of belligerent interference with the trade of the neutrals is the nature and extent of the

relations which the neutrals themselves establish with the enemy.

Those relations have compelled the assertion by belligerents of a right to visit and search neutral merchantmen in all circumstances, and of a correlative duty in the neutrals to submit to visit and search whenever it is claimed. There is in this a very direct interference with the Freedom of the Seas. Round this question all the historic disputes have centred, for the neutrals denied the duty and resisted the exercise of this right.

The wars in which these disputes arose were those in which a yet larger issue was involved, a struggle for world-dominion. Of such wars England inevitably became the pivot. For, if one country hold the command of the sea, so great is its influence that, even with little strength on land, it interposes an effective bar to the achievement of the ambition.

Such was the position of England. By the development of sea-power, the natural resource of an island kingdom, she created from the surrounding seas the barrier of her safety. Hence the later struggles for world-dominion have involved an attempt to wrest from England the supremacy of the seas.

It must be conceded that the rules of sea warfare cannot be framed to suit the exigencies of one country's position in the world. But the point involved is this: that an analysis of the history of these conflicts condemns the principles which enemy and neutral sought to force on England, because it reveals the true motive underlying them, and shows very clearly that the principles which the neutrals proclaimed did in fact very largely concern and benefit the enemy.

Not the least of these important facts is that the most vehement assertions of these principles by the neutrals have coincided with projects for the invasion of England. The foundations of the dispute were laid in the time of the Armada; it grew in strength in 1756, was further developed in 1783, and reached its zenith in 1805. History has lately repeated itself.

An analysis of the principles themselves leads to the

same conclusion. The neutral claims took the form of "freedoms," whose principal characteristic was the development of an admitted truth into a fallacy favourable to the enemy. Thus, freedom of trade upon the sea became "freedom of neutral trade with the enemy." Thus also that state of quiescence which neutrality not merely enjoins, but which the security of neutral States demands, was transformed into the freedom of the neutral flag to protect enemy property at sea, known familiarly in the form of the maxim, "free ships free goods." And so the fact that the sea is free was perverted into an all-embracing "Freedom of the Seas," favourable to neutral activities of commerce with the enemy, and restricting within the narrowest limits belligerent activities to prevent it.

These general statements are borne out by the outstanding fact that this spurious "Freedom of the Seas," conceived by the neutrals to serve their own ends, became Bonaparte's catchword when he sought to destroy England's supremacy at sea as an essential preliminary to establishing it for himself, and so achieving world-dominion. The new formulas which it included would, if they had been admitted, have become effective weapons. They would have supplied him with merchantmen to carry his commerce in place of his own, which had been driven from the sea; the neutral flag would have saved him from the necessity of supplying them with the escort of men-of-war.

The foundations of fallacy once laid, further fallacies, devised with the same object, came to be built upon them. Of these the most notorious were, that neutral produce should be free; that private property should be exempt from capture at sea; that war on the sea should be conducted in the same way as war on land; that merchant ships under convoy should be exempt from search and seizure.

The acceptance of these theories by the majority of European States at different times has undoubtedly given them the appearance of being founded in justice; and they were endowed with a fictitious morality

because they do, at first sight, seem to come within the scope of the true "Freedom of the Seas."

If there were any substance in the contention that a widely spread recognition of a theory entitles it to rank as a principle of the Law of Nations, then undoubtedly there is a mass of evidence favourable to this theory of the neutrals. On this so-called unanimity the writers persistently dwell, and on the strength of it the Declaration of Paris was framed. The other side of the case was ignored. Of greater weight than England's consistent refusal to accept the theory is the fact that, when these neutrals went to war, they had no qualms of conscience about abandoning it. They advocated it only when it suited their purpose and brought them profit. English statesmanship during the great wars was specially directed to combating what were rightly called "new-fangled doctrines," to whose appearance a specific date, 1752, and to whose development a specific period, 1752 to 1815, can be assigned.

The form of this treatise, which is essentially historical, does not admit of any prolonged study of the doctrines themselves; but they must be briefly examined in order to make history intelligible. The historical analysis makes this much plain: that the doctrines had their origin in a human desire, as old as fighting itself, to make profit out of other peoples' wars. The trader contended that "commerce" attracts to itself certain natural rights which are paramount in war. But the rights of commerce had been reduced into something like order in the thirteenth century by the *Consolato del Mare*, in which the claims of the neutral trader to non-interference were nicely balanced against the claims of the belligerent to non-interference. The principles worked out by the *Consolato* had become time-honoured through their adoption by the majority of States. The new contention involved a departure from them.

In the seventeenth and eighteenth centuries another person forced himself prominently into notice—the carrier. He, like the trader, pursued a profitable

calling, and his profits, like those of the trader, were enhanced by other peoples' wars. He also resorted to formulas to protect and develop those profits; but in justice it must be said that it was long before he turned them into assertions of rights. He achieved his end by the more legitimate method of barter, offering something in exchange for the privilege he sought to acquire; more often than not, an alliance.

In 1752 the dispute developed dangerous symptoms. Without offering the same consideration, the trader claimed the carrier's privileges as his own rights; then in process of time vendor and carrier merged into one person, the "neutral," who surrounded himself with a barrier of formulas.

Finally, the enemy adopted for his own benefit all the formulas, together with all the privileges and rights they represented. They exactly fitted the necessities of his case; and the analogy of a legal principle stood him in good stead. He was purchaser of the commodities, consignee of the cargoes; the rights of vendor and carrier, once established, enured to his benefit. There was thus established the most powerful weapon a belligerent can possess—the sympathy of the neutral trader, springing from community of interest.

It is very necessary to appreciate one feature of the discussion which has already been hinted at. The rights were asserted as belonging to neutral *nations*, and were thus lifted from the plane of mere profit. But the privileges and the rights, if they existed, were to be enjoyed by *individuals*. Undoubtedly the resultant mass of profit benefited the individual's Government, since the prosperity of the subject reacts beneficially on its fiscal departments. But a clear insight into the problems raised can only be obtained by remembering that the actual questions in dispute were not national. To endow them with that quality is to eliminate the element of the human trader with which every phase of the subject abounds. At one

stage of the dispute "the flag" was introduced, and the real issue still further obscured.

On the other hand, this also must be constantly borne in mind. "Neutrality" is a state which affects Governments, not individuals. Strictly speaking, there is no such being as a "neutral person." Any duties of non-interference by individuals in war must be imposed by municipal legislation, and may vary in each State. They lie outside the province of "International Law." That law does not forbid trading by subjects of a neutral State, even in contraband of war, with either belligerent; nor does it prohibit carrying the objects of that trading even in contraband, on the sea. If there were any such law it would apply on land as well as on the sea. But carriage of commodities to one belligerent by sea is subject to a risk—the risk that the other belligerent may seize them. Disregard of this principle characterised the Armed Neutralities; and their municipal legislation did not fulfil its promise.

These, however, are abstract considerations; the point lies in their concrete application to the great struggle in which they were forced into prominence. Supremacy at sea could not be wrested from England otherwise than by fighting her at sea. Fighting at sea necessitated repairing battered ships and building new ones. The special trade with the neutrals which was essential to the enemy was in ship's timber and naval stores, in which the principal traders were Russia and the Scandinavian Powers. Thus it came about that the formulas were specially concerned with the protection of this trade, and their chief advocates were the Northern Powers of Europe. The controversy reached its climax in the Napoleonic Wars.

German ambition in the late war reflected the ambition of Bonaparte. The claim of the spurious "Freedom of the Seas," and of all the old formulas included in it, was revived to serve the old purpose—the destruction of the great impediment to world-dominion, England's supremacy at sea.

The following quotations from German writers during the war state quite frankly German aims:—

> "What do we Germans understand by freedom of the seas? Of course, we do not mean by it that free use of the sea which is the common privilege of all nations in time of peace, the right to the open highways of international trade. That sort of freedom we had before the war. What we understand today by this doctrine is that Germany should possess such maritime territories, and such naval bases, that at the outbreak of a war we should be able, with our navy ready, reasonably to guarantee ourselves the command of the seas. We want such a jumping-off place for our navy as would give us a fair chance of dominating the seas, and of being free of the seas during a war. The inalienable possession of the Belgian seaboard is therefore a matter of life and death to us, and the man is a traitor who would faint-heartedly relinquish this coast to England. Our aim should be not only to keep what our arms have already won on this coast, but sooner or later to extend our seaboard to the south of the Strait of Calais."

This statement was made by Count Reventlow at a public meeting in Berlin in March 1917, and was afterwards quoted by Lord Robert Cecil in the House of Commons. An attempt was made to attribute it to the German Navy League only, but there is no doubt that it expresses views widely held in Germany, and enjoying at least semi-official approval, which are to be found in many other similar statements in the public press. The following are typical examples:—

From an article in the semi-official monthly, *Ueberall*, by Lieut.-Commander Bierbrauer zu Brennstein, towards the end of 1917:—

> "For Germany there is only one 'freedom of the seas,' which is the liberation of the seas from the tyranny of England. England's outrageous power must be broken for ever. To achieve this end a strong and mighty Germany is required, and then the seas will be free. To achieve this a strong and powerful German navy is also required. We must have defended naval bases in our colonies and also on the Belgian coast, where no Englishman may land with hostile intent. Germany will then be the real protector of the neutrals and of the freedom of the seas. It must and shall be so."

From an article by Herr Winand Engel in the Pan-German organ, *Das Grössere Deutschland*:—

> "German policy is forced to secure for itself by all conceivable means domination over the world-sea. I deliberately use the expression 'domination over the world-sea' and not the expression 'freedom of the seas,' which is common to-day. The latter expression is either dishonest or stupid. The sea is free to us only if we dominate it. If we do not dominate it, it may one day be closed against us."

These statements breathe the same spirit as Bonaparte's fiery utterances. The "Freedom of the Seas" is explained to mean something which would enable Germany to obtain certain strategic advantages and improve her position as a maritime Power. But the nature of these strategic advantages—the naval bases demanded; the use to which they would be put ("jumping-off places" for the navy)—reveal very clearly the ulterior object of the claim. The German object in claiming the "Freedom of the Seas" does not differ from Bonaparte's—to destroy England's command of the sea, and to obtain the command as the essential factor of world-dominion. This is the military aspect of the question; the commercial aspect, as it is derived from history, is dealt with in outline in this essay. For Bonaparte it was another means of achieving the same object, and the doctrines he advanced have been advanced by the Germans. It may be summarised in one short sentence—to utilise the neutral.

The aim of the neutral was to trade with the enemy with greater freedom from England's belligerent interference. The aim of the enemy was to trade with the neutral with the same freedom, because that trade would assure his supplies of ships' timber and naval stores, without which he could not carry on the war.

This was as true of the war carried on by Louis XVI as it was of the Napoleonic Wars. Bonaparte's principle was that as against England no nation had a right to be neutral; and the "Continental System" was built up by the use he made of unwilling

neutrals, compelling them to refuse to trade with England. Louis XVI's Minister, de Vergennes. also devised a Continental System by the law of July, 1778. He promised the neutrals "free ships free goods," on condition that they would compel England to recognise the principle. He withdrew the favour from the Dutch, until they were forced to insist on a one-sided interpretation of the Treaty of Westminster of 1674, which led them into war with England. In both cases "free ships free goods" was the strategic formula by which, under the guise of "free commerce," world-dominion was to be obtained. As Mahan says, the neutral carrier "was the key of the position."[1]

The broad principle on which England's action against the neutrals has been based is to prevent their assistance in any form reaching the enemy, whether that assistance took the form of carrying the enemy's coasting trade, assisting him in carrying on his colonial trade, carrying the enemy's goods to his ports, or creating a shore depôt through which goods passed to the enemy overland.

The subsidiary points specially dwelt on in this essay are: (i) that treaties do not, as a rule, establish general principles of International Law; the enjoyment of the privileges created by them are limited to the parties who have entered into them; (ii) that the trade by which assistance is rendered to the enemy is carried on by individual merchants and shipowners, and not by neutral States; (iii) that the laws of neutrality affect Governments, not individuals; and although attempts have often been made to prohibit trade with the enemy, even in contraband, or with blockaded ports, the trading instinct is so strong that they have failed There is no other solution of the difficulty than the recognition of the fact that this trade is carried on subject to the risk of seizure by the belligerent.

So much emphasis has been laid by the Germans on

[1] *Influence of Sea Power upon the French Revolution and Empire*, Vol. II., p. 354.

the breach of neutrality which they allege to be involved in supplying contraband to the belligerents, that it may be well to point out that, if trade in contraband were prohibited by law, it would lead to this inevitable result—that all States would be compelled to fight on their own resources, and, inevitably, the small States would be rapidly absorbed by a powerful State bent on achieving world-dominion.

Exigencies of space prevent this essay from being as complete as it should be. There are at least three important questions in the history of the subject which it has been impossible to elaborate: (i) the policy of Louis XVI in 1778, which led to the passing of the law of July, in which " free ships free goods " was first adopted; (ii) the maritime law of France; and (iii) the general scheme of the old commercial treaties in which the maxim " free ships free goods " was agreed to between the parties to them as a corollary to their acceptance of " enemy ships enemy goods."

II

THE TREATY OF UTRECHT, 1713, AND THE MAXIM "FREE SHIPS FREE GOODS"

In March, 1812, the Duc de Bassano, Minister of Foreign Affairs, presented a Report to Bonaparte, which was read before the *Sénat-Conservateur* of the Empire. It began with the following sentences:—

"Sire,

"Les droits maritimes des neutres ont été réglés solennellement par le traité d'Utrecht, devenu la loi commune des nations. Cette loi, textuellement renouvelée dans tous les traités subséquents, a consacré les principes que je vais exposer. Le pavillon couvre la marchandise. La marchandise ennemie sous pavillon neutre est neutre, comme la marchandise neutre sous pavillon ennemi est ennemie.

"Les seules marchandises que ne couvre pas le pavillon, sont les marchandises de contrebande, et les seules marchandises de contrebande sont les armes et les munitions de guerre."

* * * * *

The Report is based on this thesis: the Berlin and Milan Decrees must remain in force until the English Orders in Council are withdrawn, and the principles of the Treaty of Utrecht regarding neutrals are restored to validity (*remis en vigueur*). England is to be banished from the Continent until she consents "finally to adopt the principles on which European society is based, to recognise the Law of Nations, and to respect the rights consecrated by the Treaty of Utrecht."

England's many offences were recited in the preamble to the Berlin Decree, but her crowning iniquity, in the eyes of the enemy, was the declaration of blockade of the coasts from the River Elbe to the Port

of Brest on May 16, 1806. The Duc de Bassano continued:—

> "Ce fut en 1806 que commença l'exécution de ce système, qui tendait à faire fléchir la loi commune des nations devant les ordres du Conseil et les règlements de l'Amirauté de Londres.
>
> "Le Gouvernement anglais arrachait ainsi le masque dont il avait couvert ses projets, proclamait la domination universelle des mers, regardait tous les peuples comme ses tributaires, et imposait au continent les frais de la guerre qu'il entretenait contre lui. Ces mesures inouïes excitèrent une indignation générale parmi les Puissances qui avaient conservé le sentiment de leur indépendance et de leurs droits."

This Report forms a convenient starting-point for the consideration of the historical aspect of the "Freedom of the Seas." It states, as no other document, in the most concise form, the nature of the long-standing grievance against England. In reality it is the grievance of the neutrals; it is here adopted by the enemy. Moreover, it puts the case of the neutrals as high as it can be put: that it rests on treaty, the treaty of 1713, by which the political system of Europe had been adjusted. If the neutrals could be persuaded to believe that the Law of Nations had also been settled at the same time, England's dominion over the seas would be shown to be based on the breach of this fundamental treaty; they would then the more easily be persuaded to try to shake themselves free from her domination, and Bonaparte would have gone a long way to establishing that "Freedom of the Seas" of which he claimed to be the protector. But, if the case against England as put by Bonaparte breaks down, it is certain that the neutrals can find no more powerful advocate, nor any stronger argument.

Now, first, the Report starts with a distorted statement of fact. The notification of the blockade of the Elbe was itself a reprisal for the closing by Prussia, at the instigation of Bonaparte, of the North Sea ports against British shipping on 1st April, 1806.[1]

[1] *Cambridge Modern History*, Vol. IX., pp. 364, 365.

Secondly, the Report is based on a fallacy. A treaty has no larger effect than the parties themselves propose to give to its provisions. It binds those who make it and those who adhere to it, but no others. And what is true of one treaty between many parties is equally true of any number of identical treaties. Although, therefore, the observance of a treaty, like the fulfilment of any other agreement made by States, is rightly said to be required by the Law of Nations, the provisions of a treaty have no claim to be regarded as principles of that law.

It was boldly asserted by the Prussian lawyers in the Silesian Loan dispute that treaties of maritime nations are evidence of the Law of Nations. I doubt if so crude a statement is ever now made; a more insidious argument has taken its place. It is contended that, where the same provision is found in many treaties, this shows that the trend of opinion among the nations is favourable to that provision, and that this is practically equivalent to its adoption as a principle of International Law. But this contention is completely answered by history. Many treaties, almost identical in their provisions, were concluded at the time of the First Armed Neutrality. Not only did England decline to admit that they were principles of International Law, but the parties to them found them so unpractical when they were themselves belligerent, that within a few years they all had abandoned them.

The Report is also inaccurate in another statement of fact. The "Treaty of Utrecht" did not fulfil any condition, real or imaginary, which justified the Duc de Bassano's assertion that it became, or was ever intended to become, the "common law of nations." It is no more than a convenient historical expression used to indicate all the treaties by which the War of the Spanish Succession was brought to an end in 1713. There were separate treaties between England, Prussia, Holland, Savoy, and Portugal on the one hand, and France and Spain on the other. These were treaties of peace, with

which we have no concern. There were also commercial treaties between England and France, England and Spain, France and Holland, Spain and Holland, France and Savoy, and Spain and Portugal. Only the first three dealt with trade between neutrals and the enemy. According to the Duc de Bassano, therefore, the "common law of nations" depends on the identity of principles adopted in these three treaties.

Yet even this does not exhaust the fallacies with which the subject is surrounded. It is very commonly asserted that, by the Commercial Treaty of Utrecht between England and France, England "accepted" the doctrine that free ships make free goods. If this were true, the hostile criticism of England's attitude would be amply justified. It is essential, therefore, once and for all, to get at the true facts of the case.

A brief study of the meaning of the doctrine will be necessary, because the assertion that enemy property ought to be, and therefore is, exempt from capture on board neutral ships, is woven into every phase of the history of England's disputes with the neutrals, and is the cardinal principle on which rests the spurious "Freedom of the Seas." All the subtleties involved in its gradual rise to its present prominence must be studied quite apart from the fact that it was included in the Declaration of Paris.

Now, first, it is a treaty formula, and nothing else. In spite of all that has been alleged to the contrary, the principle involved in the formula is not, and never has been, a principle of International Law. The laws of no State recognised it prior to the French law of July 1778, but, on the contrary, the laws of all maritime States empowered their cruisers to seize enemy property on neutral ships.

On the very threshold of the enquiry, moreover, we are confronted with a difficulty. For the practical purpose of appreciating what the consequences of the maxim would be in war, it would seem essential to be familiar with the wording of the clauses embodying it. In no other way can we ascertain to whom the privilege

has been granted, and in what circumstances it may be exercised. Nowhere—so far as I have been able to trace—has the form in which the maxim is commonly introduced in the treaties been fully considered and properly emphasised. It is to this effect: if one of the two contracting parties is at war with a third State, then the other, remaining neutral, may trade freely with the enemy, and may even carry his goods free. To take a concrete case. Suppose a treaty between Holland and Peru contained this clause: then, if Peru were at war with Bolivia, Holland might carry Bolivian goods free; or, if Holland were at war with Bolivia, Peru might do the same. Obviously this is a very limited adoption of the principle, for the case of war between Holland and Peru does not come within the scope of the arrangement. If the principle were agreed to in such a case, the language of the clause would run somewhat as follows—"If the two contracting parties are at war with each other (which God forbid), then the goods of each may be carried on neutral vessels without interference from the other."

The consequences resulting from these two forms are radically different. By the first, the right to carry free is granted to one neutral only. The enemy, the "third State" with which one of the parties may be at war, will only have a very limited right to "free" carriage for his goods. By the second, free carriage by *all* neutrals would be conceded to the potential enemy, and thus, through him, the privilege would be acquired by all neutrals.

There are so many treaties in which the principle is introduced, that I hesitate to make the positive statement that this second form does not exist in any of them. It is almost certain, however, that it is not to be found in any treaty prior to the Armed Neutrality Conventions. It was introduced into them in circumstances which are explained in this treatise, and also in many concluded under its inspiration between 1780 and 1800. These conventions were intended to have a collective operation; and the agreement in them

took the form of a definite statement of principle to which the several Powers adhered : that free ships make free goods. Presumably, therefore, it should have applied in the case of war between any of the adhering Powers, a presumption unfortunately not borne out by facts. Between 1800 and 1856 the practice of independent treaties between two States was reverted to; and it is during this period that the second form of the clause, if it exists at all, will be found. In 1856, with the signing of the Declaration of Paris, the question entered another phase.

This brief survey made of a very complicated subject, we may now enquire what warrant there is for any of the current statements with regard to the position of England after the Commercial Treaty of Utrecht with France. Article XVII runs as follows :—

" Il sera libre à tous les sujets de la reine de la Grande-Bretagne et du roi T. C. de naviguer avec leurs navires en toute liberté et sécurité, et sans distinction relative au propriétaire des marchandises qui y sont chargées, d'un port quelconque vers un endroit appartenant aux ennemis du roi T. C. ou de la reine de la Grande-Bretagne. Il sera de même permis aux susdits sujets et habitans de naviguer avec lesdites marchandises et les navires en toute liberté et sécurité des endroits, ports et stations des ennemis des deux parties ou de l'une d'elles; et cela sans aucune contradiction ni empêchement, non seulement directement des susdits endroits hostiles à un endroit neutre, mais aussi d'un endroit hostile à un autre, qu'ils soient sous la juridiction du même prince ou sous différentes juridictions.

" Et, comme il a déjà été stipulé, à l'égard des navires et des marchandises, qu'un vaisseau libre rende aussi libre la marchandise, et qu'on regarde comme libre tout ce qui sera trouvé chargé sur les navires appartenant aux sujets de l'autre partie contractante, quand même la totalité de la cargaison ou une partie d'icelle appartiendroit aux ennemis de l'une ou l'autre majestés, à l'exception toutefois des marchandises de contrebande, il a été convenu de même que cette liberté s'étendra aussi aux personnes qui se trouvent sur un navire libre; de telle sorte que quand même elles sont ennemies des deux parties ou de l'une d'elles, elles ne seront pas enlevées du vaisseau libre, à moins qu'elles ne soient militaires et au service de l'ennemi."

By Article XVIII contraband was excepted from the application of Article XVII.

The provisions of this article are three. First, if one of the parties should be at war, the subjects of the other party may continue their commerce freely, irrespective of the ownership of the cargo, even to enemy ports. "Free ships free goods" is not accepted in so many words; nor is it to be derived from a provision very common in the early treaties allowing free commerce with the enemy. It is the necessary inference from the recognition of a right of free navigation irrespective of the ownership of the cargo.

Secondly, the principle is repeated and reinforced: this trade may be carried on, not only irrespective of the ownership of the cargo, but also irrespective of the ports of departure or destination, even though both may be enemy ports. In other words, the subjects of the party not at war may trade between the ports of the enemy of the other party. The principle is extended to wars in which the two parties are engaged with a common enemy. Thirdly, the principle of "free cargoes" is extended to enemy subjects on board vessels belonging to the other party. Unless they are soldiers in the enemy's service, they are to be free persons.

But this third provision is stated in a long and complicated paragraph in which there is an express reference to "free ships free goods," and it is this paragraph which has given rise to much misconception. It is assumed that it condenses into this formula the effect of the first part of the article.

In order to understand this paragraph it is necessary to examine the earlier treaties between France and England.

In the Treaty of Westminster, concluded between Cromwell and Louis XIV in 1655, the question was dealt with very superficially in the following articles:—

> "XV. That for the space of four years to come, or until other stipulations are agreed on, the ships of either nation may carry commodities of any kind to the enemies of the other, excepting to places besieged, and excepting military stores, in which cases they shall be deemed lawful prize."

"XXII.—Either party may traffick freely to any country at war with the other, observing the stipulations of the fifteenth article, in relation to contraband and places besieged."

In the Treaty of St. Germain-en-Laye, however, in 1677, the subject is dealt with in a much more elaborate manner. The articles are very complicated, because the case of each of the contracting parties is dealt with separately. Article I lays down the general principle of freedom of commerce carried on by the subjects of each country with all countries in peace or neutrality, without molestation on pretext of war between the other party and those countries. The words used are "naviguer, négocier, et faire toute sorte de trafic"; and they are specifically explained to mean that, with the exception of contraband, traffic in war is to continue as in peace.

Whatever might be the interpretation of this article if it stood alone, its meaning is explained in Article VIII, which will be more easily understood by taking the concrete case of war between France and, say, Holland, England remaining neutral. The principles, and the only principles, laid down are these:—

(a) That English goods on Dutch [or French] ships may be seized: affirming "enemy ships enemy goods"; "*et au contraire*"

(b) That Dutch [or French] goods on English ships may not be seized: affirming "free ships free goods."

The article then proceeds to deal with the case of a "new war," and declares that it seeks to prevent such a war, in which one of the parties may become engaged, from doing harm to the subjects of the party remaining at peace. The seizure of an enemy ship laden with the goods of subjects of this party is not to render the goods liable to confiscation if they are laden within a certain period after the outbreak of war, the principle "enemy ships enemy goods" being thus suspended for a time.

The acceptance by England of principles entirely at variance with her ancient maritime law is at first sight

startling. In order to understand the reason we must first appreciate the extreme severity of French maritime law towards neutrals. Not only were enemy goods seized on neutral ships, but the ships themselves were confiscated in virtue of the Ordinance of 1681. Also neutral goods were seized on enemy ships.

The position then before the Treaty of St. Germain-en-Laye was that both France and England seized enemy goods on neutral ships, but France seized the neutral ships as well. She also seized neutral goods on enemy ships, while England restored them, only confiscating the vessel. But after the treaty, although the general laws of both countries remained unaltered, in wars in which one of the two countries was engaged, the other remaining neutral, *both* countries seized that neutral's goods on enemy ships, and *both* released enemy goods on that neutral's ships. Both countries, therefore, for this limited purpose, accepted "free ships free goods"; but, in doing so, France made a greater change than England, for she gave up the seizure of neutral ships which had enemy goods on board. The result was that, when France went to war, English neutral ships were freed from confiscation when carrying enemy goods. It was a concession for which a price was paid: enemy goods themselves were freed.

Yet even this does not explain the radical change in the law reciprocally agreed to in this treaty; for France also gave up the confiscation of enemy goods on neutral ships when they were English.

We may legitimately assume that France would not have abandoned her ancient practice without a *quid pro quo*. The inference is clear: England's acquiescence in "enemy ships enemy goods" was the consideration for the benefit obtained in favour of English ships. This view is supported by Schoell and Reddie.

This principle is so foreign to English principles of maritime law that a brief space must be devoted to it. The justification for its adoption is that it checks one form of assistance to the enemy; the reason for it is

that the enemy flag does *prima facie* impart its quality to the goods on board. But, this once admitted, it would follow that the neutral flag should also impart *its* quality to the goods laden under it; and thus the adoption of "free ships free goods" logically followed, the justification being the mutual trade advantages derived from it. It was an arrangement by which a war in which one party should be engaged was prevented "from doing harm to the subjects of the party remaining at peace." Henceforward, therefore, the principle that the flag governed seizures was established between the two countries when one of them was at war with another Power.

This explanation inverts the usually accepted order of evolution of the two maxims, but it affords a solid reason for, and explanation of, the changes in the law of France in favour of English ships: the reciprocal adoption *by both countries* of a new principle of seizure, from which, while both would lose in some circumstances, both would profit in others. Moreover, it fits in with the sequence of the maxims as dealt with in Article VIII, and the use of the words "*et au contraire*" (p. 21), in introducing "free ships free goods."

This distinct trace of a natural evolution eliminates from "free ships free goods" the humanitarianism which has been appealed to in support of it at a later period. It also eliminates any general idea of commercialism in the sense of benefiting the neutral. It substitutes very substantial but reciprocal commercial advantages to the parties to the treaty.

The provisions of this Treaty of Utrecht now become intelligible. First, they are no more than a renewal of the provisions of Article VIII of the Treaty of St. Germain-en-Laye, the first part of Article XVII being almost identical with the earlier article. They were in need of renewal on account of the revival in 1704 (during the Spanish Succession War) of the French Ordinance of 1681. The settlement of outstanding commercial questions at Utrecht was made

the occasion for adjusting the difficulty and reaffirming the provisions of the Treaty of St. Germain-en-Laye. Secondly, the principle "enemy ships enemy goods" was also reaffirmed at Utrecht, a point which the commentators invariably overlook. Finally, the words "Et, comme il a déjà été stipulé" explain themselves; they refer to the introduction of "free ships free goods" into the Treaty of 1677, and *not* to its reaffirmation in the first part of the article. The object of the second part of the article was merely to extend the principle of "free goods" to "free persons" on board enemy ships.[1]

It is impossible that the second part should refer to the first part of the article, because it recites a provision which is not contained in it:—

> "Et, comme il a déjà été stipulé, à l'égard des navires et des marchandises, qu'un vaisseau libre rende aussi libre la marchandise, et qu'on regarde comme libre tout ce qui sera trouvé chargé sur les navires appartenant aux sujets de l'autre partie contractante, quand même la totalité de la cargaison ou une partie d'icelle appartiendroit aux ennemis de l'une ou l'autre majestés. . . ."

There are similar though not identical stipulations in Article VIII of the treaty of 1677—"bien que les dites marchandises fissent la meilleure partie de la charge entière des dits vaisseaux." The meaning of that is that free ships are to make free goods, even though the greater part of the cargo belongs to the

[1] It is necessary to notice a curious and most misleading mistranslation of the French text in the English official version of the treaty, which is printed in Chalmers' Collection, and reproduced by Reddie. The sentence beginning "Et, comme il a déjà été stipulé . . ." is rendered, "And it is now stipulated concerning ships and goods, that free ships shall give a freedom to goods. . ." This version of the article has undoubtedly given rise to the statement above referred to, that England adopted the maxim in the Treaty of Utrecht; and all the criticisms of her subsequent action in regard to the maxim are clearly based upon it. It is sufficient to point out that the words themselves, "comme il a déjà été stipulé," show that the principle was not accepted then, but had already—*déjà*—been agreed to. It is further to be noted that the treaty is bilingual, both the Latin and French texts being joint originals.

enemy. The meaning of the reference in the Treaty of Utrecht is that free ships make free goods if the whole or even a part of the cargo belongs to the enemy.

Can this discrepancy in the reference be explained? It can only be a verbal discrepancy, because it is not possible to construe the earlier provision to mean that the ship is to impart its freedom to the goods if, say, seven-eighths, but not the whole cargo, is enemy; and, therefore, the existence of variable texts of the treaty of 1677 might possibly furnish the reason. The more probable explanation, however, is that the proceedings of the French during the war, especially the re-enactment of the law of 1681, had aroused suspicions; and that, therefore, a paraphrase, intended to remove any doubt as to the meaning of the earlier provision, was introduced into the Treaty of Utrecht.

The result of this somewhat elaborate analysis of Article XVII of the Treaty of Utrecht may now be summarised. It disposes of the contention that England adopted in that treaty the novel principle in her wars that the neutral flag covers enemy cargoes.[1] It refers that adoption to a much earlier period. But in regard to this adoption it established these facts; first, that it was for a very definite purpose—to relieve English vessels when neutral in French wars from the severity of French maritime law. It was therefore limited in its scope and intention to France. Secondly, it was not adopted by England alone, but also by France. Quite apart from the reason for the change, there was a reciprocal concession for a reciprocal advantage. Thirdly, this reciprocal arrangement was not merely that the neutral flag should cover enemy's goods, but that "the flag" should cover the cargo in all cases; if the flag was enemy, then the goods were to be considered enemy; if neutral, then the goods were to be considered neutral.

[1] See *Cambridge Modern History*, Vol. V., p. 443.

But this leads to a more far-reaching conclusion. Of the maxim, "free ships free goods," Pitt declared that, when granted, it was as a matter of favour, not as of right. Fox, when he justified his offer to Catherine, in 1782, to accept the principle, declared that he intended to get something in return—an alliance with Russia, of which we then stood greatly in need.[1] In the foregoing analysis of our agreement with France the something that we obtained in return has been made clear; it was a material alteration of the French law in favour of our ships. And so it is in all the other cases in which we have accepted the maxim in a treaty. Nowhere is there to be found a bald acceptance of the principle. It is accepted reciprocally in treaties of commercial alliance; that is, in treaties concluded under the influence of a desire by both parties to obtain reciprocal commercial advantages. Commercial alliances, however, are often intimately connected with political alliances; and in every other case in which England has accepted the maxim a political alliance has been close at hand.

This hardly needs emphasising in the case of the Dutch. The manifest advantage conceded, after many years of strenuous diplomacy, to the great carrying nation in 1674 was compensated by the specific agreement of 1678 for mutual succour in the event of either party being attacked.

In the case of Spain the commercial treaty was made in 1667, and was confirmed by the treaty of alliance in 1670. In the case of Portugal the first commercial treaty was concluded in 1642; but this was replaced by the treaty of 1654, which was a treaty of peace and alliance.

This, then, is the first fact to be appreciated in regard to the appearance of the maxim in the English treaties. But there is another of equal importance, which enables us to get to closer grips with the Duc de

[1] March 25, 1801 (*Hansard*, Parl. Hist., Vol. xxxv, Col. 1127 *et seq.*)

Bassano's statement that the "common law of nations" was established at Utrecht.

A commercial treaty was also concluded in 1713, between France and Holland, in which the principle of the flag was accepted. It existed in the old treaty between England and Holland. Therefore these three countries, England, France, and Holland, severally agreed that, whenever there was a war between any two of them, the flag of the third, remaining neutral, should protect the property of either belligerent from seizure by the other.

The consequences of this will be made clearer by taking concrete cases:—

(a) England at war with Holland: Dutch goods on French ships would be free under the Anglo-French treaty, English goods on French ships would be free under the Franco-Dutch treaty.

(b) England at war with France: French goods on Dutch ships would be free under the Anglo-Dutch treaty; English goods on Dutch ships would be free under the Franco-Dutch treaty.

(c) France at war with Holland: French goods on English ships would be free under the Anglo-Dutch treaty; Dutch goods on English ships would be free under the Anglo-French treaty.

The freedom of enemy goods on neutral ships in any of these several wars would extend no further than as here stated, for the plain reason that the treaty stipulations warrant no more extended modification of the practice. Again concrete cases will make this intelligible:—

If England were at war with Holland, neither Dutch nor English goods would be free on Russian ships; nor, if England were at war with France, would French or English goods be free on Bremen ships; nor, if France were at war with Holland, would French or Dutch goods be free on Danish ships; for in none of these cases is there a treaty to support the claim.

Two things are thus made abundantly clear. Firstly, that, in the common form in which "free ships free goods" is accepted in the treaties, its application is strictly limited to the specific case provided for; and nothing but a stipulation that the principle is to apply in case of war between the parties to a treaty could warrant the claim to the wider freedom for enemy goods on all neutral ships. Secondly, that, so long as the common form is adhered to, a number of similar treaties between different States would bring the principle no nearer to that universal acceptance which alone would warrant the statement that it has become part of the "common law of nations." Such universal acceptance could only be arrived at, *if at all*, by a treaty to which all nations were adherent, in which "free ships free goods" was accepted as a definite principle. It would then, all being adherent, govern every war between any two or more nations, and the belligerents and all neutrals would be entitled to claim the benefit of it.

The application of the principle "enemy ships enemy goods," also accepted in these three treaties, would work out in a corresponding manner.

III

THE SILESIAN LOAN, 1752–3

THE history of the Silesian Loan, of its guarantee by Frederick the Great, of his refusal to pay the final instalment in order to recoup his subjects for losses sustained by them on account of the seizure of some Prussian neutral ships by English privateers during the war with France (1744-1748), together with the full text of the documents and despatches, will be found in Sir Ernest Satow's monograph, "The Silesian Loan and Frederick the Great."[1] The documents are (1) The "*Exposition des Motifs*," prepared by Frederick's lawyers; (2) the Report of George II of the English Law Officers, commonly known as the "*Réponse sans Réplique*"; (3) A Memorandum prepared by the French Government. The English Law Officers were Sir George Lee, Dean of Arches; Dr. G. Paul, Advocate-General; Sir Dudley Ryder, Attorney-General; and Mr. William Murray, afterwards Lord Mansfield, Solicitor-General.

The Prussian Exposition is of great importance, because it was the first public challenge to established practice, and claimed that free ships as of right make free goods. It recognised the fact that, up to that time, the maxim was only to be found in treaties; but it deduced from this fact its general acceptance by the nations as a principle of the Law of Nations. The chain of reasoning was this. Belligerent rights as against neutrals are limited to search for and seizure of contraband and seizure for breach of blockade. This established, it followed that enemy property could not be seized on board neutral ships, and *therefore* that free ships must make free goods.

[1] Oxford, 1915.

Of the ships seized some had been simply returned; but (1) some were restored by the Prize Court with freight and the enemy goods on board only condemned; and (2) some were restored, but their cargoes condemned as contraband going to the enemy.

The argument of the *Exposition des Motifs* took the form of answers to a series of questions propounded by Frederick. The first question was whether the English cruisers had a right to seize Prussian vessels at sea and take them into an English port for adjudication, in spite of the exhibition of their papers, which showed that there was no contraband on board. The answer of the lawyers was that the seizure was a violation of the Freedom of the Seas.

> "Ce procédé est visiblement contraire au droit de la nature et des gens, selon lequel c'est un principe universellement reconnu par tous les peuples raisonnables, que la mer est au nombre des choses appelées *res nullius*, ou desquelles l'homme ne peut se rendre le maître. Si donc personne ne peut s'attribuer la souveraineté et la propriété de la mer, il s'ensuit naturellement que l'usage en est commun à tous les hommes, et que personne n'est en droit de l'interdire aux autres. Selon ces principes fondés dans la raison, toutes les Puissances ont un droit égal de naviguer et de commercer sur mer."

The second question was whether there was a right to visit Prussian vessels at sea, on the ground that they had enemy property on board? The answer was that although the vessels had been released, and only the French enemy property on board confiscated, yet this was contrary to the Law of Nations and all treaties, because Prussians had by that law the right to traffic with France and Spain. It was insisted that no wrong could be done to England, because these vessels had been seized on their return voyage to neutral ports, and therefore there could have been no question of contraband, which was the only exception to free navigation applicable to the case. Further, it was incontestable that "selon la raison et le droit des gens même," enemies are safe from one another when they meet in a neutral place; that therefore a belligerent

cannot attack his enemy nor seize his goods in such a place; and the Prussian vessels were a neutral place:

> " Cette loi du droit des gens se trouve confirmée par cette maxime notable, expressément établie dans les traités entre l'Angleterre et la Hollande et entre l'Angleterre et la France, *que les vaisseaux libres rendent les marchandises libres.*"

It was further contended that neutral commerce with a belligerent continued during war on the same footing as in peace, except in regard to contraband, which was limited to munitions of war.

To the general proposition advanced by the Prussian lawyers, "that the sea is free," the English Law Officers replied:

> " They who maintain that proposition in its utmost extent do not dispute but that when two Powers are at war they may seize the effects of each other upon the high seas, and on board the ships of friends. Therefore that controversy is not in the least applicable upon the present occasion."

This was too clear to admit of dispute. It was supported by every writer upon the Law of Nations, and by the constant practice; but the general rule could not be more strongly proved than by the exceptions which particular treaties had made to it.

Dealing with the specific proposition that free ships make free goods, the English Law Officers went to the root of the matter. The new doctrine had been deliberately invented to justify a new form of neutral assistance to the enemy. From 1746 " the Prussians engaged in the gainful practice of covering the enemy goods; but were at a loss in what shape, and upon what pretences, it might best be done"; before that year they "don't appear to have openly engaged in covering enemy's property."

This practice was not justified by the Law of Nations, which had established the following propositions: (1) That the goods of an enemy, on board the ship of a friend, may be taken. (2) That the lawful goods of a friend, on board the ship of an enemy, ought to be restored. Particular treaties had, how-

ever, by agreement, inverted both these rules, declaring "the goods of a friend, on board the ship of an enemy, to be prize; and the goods of an enemy, on board the ship of a friend, to be free." (3) That contraband goods, going to the enemy, though the property of a friend, may be taken as prize.

These propositions justified the seizure of the Prussian ships. The Law Officers' reference to the inversion of the rule of the Law of Nations by some treaties, including the Commercial Treaty of Utrecht, was probably sufficient for their purpose, which was simply to show that no such agreement existed with Prussia. And indeed the Prussian lawyers had not relied on that treaty as governing the case. It was referred to, as also the treaty of 1674 between England and Holland, in order to establish the application to the case of the alleged principle that "le droit des gens se vérifie principalement par les exemples et les traités des puissances maritimes." Both sides, therefore, appear to have recognised that the Commercial Treaty of Utrecht did not apply to the case; though the reason was not specifically mentioned. As pointed out in the preceding section, that treaty did not accept "free ships free goods" as applicable to war between England and France. It did no more than allow each Party to trade freely with, and carry free the goods of, any third State with which the other Party might be at war.

The third document (see p. 29) emanated from the French Government. The British Cabinet had asked France for *bons offices* in the settlement of the dispute. Both the *Exposition des Motifs* and the Answer had been published to the European Powers; and the French Government tried to convert this request into one for mediation.[1] There were still some outstanding questions between England and France in respect of prizes taken during the war: and the occasion for presenting a Note was too good to be missed. Some of

[1] *Cf.* Satow, *op. cit.*, ch. xiv.

the principles of prize law contained in the Law Officers' opinion necessarily affected the rights of French subjects; it seemed indispensable, therefore, to state those on which France agreed, and to discuss others in the hope of arriving at some agreement in regard to them. A few paragraphs in this document[1] merit attention.

The proposition was accepted that a belligerent has the right to seize the ships, cargoes, and property of his enemy on the high seas, and that everything that belongs to the enemy is good prize, while the property of a friend, so long as he remains neutral, cannot be seized. But the conclusion was not necessarily that which the Law Officers had drawn. This is dealt with in the following paragraph, to be specially noted on account of the very hesitating way in which "free ships free goods" is advanced. The Law Officers, it said, had drawn the natural conclusions from the general principle; but, as exceptions often prove the rule, the opposite doctrine which supported the maxim might possibly (*peut-être*) be the right one.

> "Les Magistrats anglais ont tiré de ce principe plusieurs conséquences. La première, que les effets d'un ennemi peuvent être saisis, quoi qu'à bord d'un vaisseau ami; la seconde, que les effets d'un ami doivent être rendus, quoi que trouvés à bord d'un vaisseau ennemi.
>
> "Ces deux conséquences paroissent naturellement résulter du principe que l'on vient de rapporter; mais comme l'exception est souvent une confirmation de la règle, on pourrait peut-être soutenir que le pavillon ennemi rend la marchandise de l'ami sujette à la confiscation."

It was then suggested that the uncertainty of the consequences resulting from the general principle of seizure of enemy property had probably been the reason why nations had agreed in treaties that their flag should cover enemy goods; though it was not possible to decide whether these stipulations were an exception to, or a confirmation of, the Law of Nations. At any rate, the uniformity of the treaties on this subject may

[1] Satow, *op. cit.*, Appendix, No. 75.

be taken as "a sort of maritime jurisprudence" accepted by the European Powers. Whether this were so or not, the treaties of France with England and Holland are formal on the question; they are the law on the subject between France and these two countries, irrespective of what the Law of Nations may be on the subject.

It is clear from what has already been said, that the several Commercial Treaties of Utrecht are here given a larger significance than their language warrants.

The French Government also objected to the third consequence drawn by the Law Officers from the fundamental principle: that contraband going to the enemy is good prize, although it belongs to a friend. It was based on the supposition that the European nations were in agreement as to what goods are contraband. In the absence of agreement the result of this would be that each belligerent could decide what he proposed to treat as contraband, and "on pourroit envelopper sous ce vaste prétexte presque toutes sortes de marchandises et d'effets."

The argument again adopts treaty agreements as substantive rules of the Law of Nations. The Law Officers had not explained with precision what they held to be contraband; it was, therefore, necessary to look upon existing treaties as the least equivocal and most impartial statements of what the European nations considered contraband. By these treaties the definition of contraband was limited to soldiers, horses, and munitions of war, and provisions carried to a blockaded port. If the English Courts had condemned cargoes of wood and hemp (*bois et chanvre*), or provisions going to ports not blockaded, as contraband, it was clear that they had not these treaties before their eyes.

Thus the question on which the discussions during the next sixty years were to turn was quite frankly stated. "*Bois et chanvre*" may be taken as standing for ships' timber and naval stores. They were not included in these treaty definitions of contraband;

therefore they were not contraband. The reference to provisions is important. It implies that, if they are going to a blockaded port, they may be treated as contraband. Even in those days, therefore, the intimate relation in principle between blockade and contraband must have been appreciated.

Two further documents were prepared; the Answer of the English Law Officers to the French *Mémoire*, and the Prussian Answer to the English Report. Neither of these documents was presented, as the dispute was amicably settled. The English answer is not extant; but the most important part of the Prussian answer is printed in Vol. II. of Martens' *Causes Célèbres*. It is interesting, because its statement of the contention, that "free ships free goods" is a principle of the Law of Nations, is more primitive than that contained in the *Exposition des Motifs*. Briefly it was as follows: By natural right a man may not be dispossessed of his property even for a single moment; therefore his ship cannot be visited to search for enemy property any more than his territory. "Free commerce and navigation" is of universal utility; "tout le monde y trouve son compte." This is the fundamental principle of the Law of Nations. The inconvenience resulting from the opposite rule has led the majority of commercial nations to adopt "free ships free goods" by treaty; therefore these treaties are not an exception, but show that the rule ought to be followed by all nations. No nation has a greater interest in its universal recognition than the English; for what would become of their commerce with the East and West Indies in the event of war between Spain and Holland?

"Enemy ships enemy goods" is the parent rule of "free ships free goods"; and the rule of the flag in its two branches sets at rest all disputes as to the nature of the cargoes, and leaves to each neutral nation free commerce in everything except contraband, and in the blockaded ports. But to this broad principle a very important exception was admitted, which has been

lost sight of in subsequent statements of the neutral contention; it only held good so long as the neutral nation pursues only its own commerce, without engaging in what may be called with justice "faire le commerce des ennemis *pour eux*." Then the neutral would become an auxiliary, and after due notice would deserve to be treated as an enemy.

IV

THE SEVEN YEARS WAR, 1756-63

In 1756 the long-simmering dispute between France and England over their American colonies broke out, and the Seven Years' War began. The war holds an important place in the development of the principles of English maritime warfare, because what is known as the "Rule of 1756" was put in force immediately it commenced. Stated concisely, the "Rule" is this: If neutrals engage during war, either on their own account or on behalf of the enemy, in commerce which is forbidden to them by that enemy in time of peace, they are held to be assisting or identifying themselves with the enemy; and their vessels are therefore treated as enemy vessels, and confiscated.

The colonial and the coasting trades were monopolies. When, therefore, the enemy threw them open to the neutrals, the "Rule" applied. It is generally assumed that the Rule was abandoned after the Napoleonic Wars, as it had caused so much ill-feeling among the neutrals. But M. Drouyn de Lhuys informs us that in 1854, when arrangements were under consideration for assimilating French and English practice during the Russian War, the British Government desired to maintain the Rule. M. Drouyn wrote at that time to the French Ambassador in London:—[1]

> "Le Gouvernement anglais paraît insister pour que le projet de déclaration défende aux neutres de se livrer, pendant la guerre, soit au commerce colonial, soit au cabotage, s'ils sont réservés pendant la paix. Je n'ai pas besoin de vous rappeler avec quelle persistance le Gouvernement français, à toutes les

[1] Printed in a *Mémoire* published in Paris in 1868.

époques, a soutenu les réclamations nombreuses et vives que l'adoption de cette règle souleva, dès l'origine, de la part des nations neutres. La France est donc liée par ses précédents historiques; elle l'est également par des traités faits avec plusieurs États dont elle s'est engagée à laisser les navires naviguer librement en temps de guerre, même entre deux ports ennemis."

This statement must be accepted with as much reserve as the suggestion that the Rule itself has been abandoned. It amounts to no more than that the Rule pressed heavily on France as a belligerent, and that she had joined her protests to those of the neutrals at the time of the Armed Neutralities.

Independent criticism of the soundness of the Rule as a principle of belligerency, which M. Drouyn's statement would appear to suggest, is wanting. The Rule has been included in the general condemnation of belligerent interference with the neutral trade with the enemy; but in the last section of the French Memorandum (see pp. 29, 32) there is an express recognition of the right to prevent neutrals trading on behalf of the enemy: in other words, identifying themselves with the enemy, which is precisely the principle on which the "Rule of 1756" rests. It is a fact, however, that when two Powers have agreed to allow trading with one another's enemies, there is often a special provision that this trade may be carried on "from port to port" of the enemy. This referred to the coasting trade; also, it was contended, to the colonial trade. Such a provision exists in the Commercial Treaty of Utrecht between England and France. England also accepted it in the treaty concluded with Russia in 1801 as a *quid pro quo* for Russia's abandonment of "free ships free goods."

V

THE WAR OF AMERICAN INDEPENDENCE, 1776-83

THE discussion of the neutral question in this war merges into the story of the First Armed Neutrality, to be considered in the next chapter, and need not therefore detain us. But a few extracts from the Diplomatic Correspondence of the American Commissioners who were sent to the Continent may be usefully referred to.

Benjamin Franklin wrote of the Northern League:—

"All the neutral States of Europe seem at present disposed to change what had before been deemed the law of nations, to wit, that an enemy's property may be taken wherever found, and to establish the rule that free ships make free goods. This rule is itself so reasonable and of a nature to be so beneficial to mankind that I cannot but wish it may become general; and I make no doubt that the Congress will agree to it in as full an extent as France and Spain. . . .

"I approve much of the principles of the confederacy of the Neutral Powers, and am not only for respecting the ships as the house of a friend, though containing the goods of an enemy, but I even wish for the sake of humanity that the law of nations may be further improved by determining that even in time of war all those kinds of people who are employed in procuring subsistence for the species, or in exchanging the necessaries or conveniences of life which are for the common benefit of mankind, such as husbandmen on their lands, fishermen in their barques, and traders in unarmed vessels, shall be permitted to prosecute their several innocent and useful employments without interruption or molestation and nothing taken from them, even when wanted by an enemy, but on paying a fair price for the same."

At a later date he condenses his views into a short formula:—

"In short, I would have nobody fought with but those who are paid for fighting. If obliged to take corn from the farmer, friend or enemy, I would pay him for it, the same for the fish or goods of the others."

All the Commissioners were not so simple-minded. Arthur Lee, referring to the law introduced by Louis XVI in July 1778, which had adopted "free ships free goods," on terms, but from the benefit of which he threatened to exclude the Dutch if they did not enforce what they believed to be their treaty rights against England, says:—

> "To make them [the Dutch] and other neutral nations feel the necessity of supporting the privileges of their flags against the English, this Court has declared its determination to make prize of all goods belonging to the enemy found in neutral ships, so long as the same is permitted to be done by the British cruisers, with regard to the effects of France in the same situation. This is such a blow to their interests as, it is imagined, must rouse the Dutch to vigorous exertions against Great Britain in support of their privileges as common carriers."

A few sentences from John Adams' correspondence in March, 1780, show a very accurate appreciation of the question in dispute—the imperative necessity for France to obtain ships' timber and naval stores to carry on the war—though it did not lead him to amend his views in regard to it:—

> "England abuses her power, exercises tyranny over commerce. . . It is essential that the Sovereign of every commercial State should make her nation's flag respected in all the seas, and by all the nations of the world. The English, not content with making her flag respectable, have grown more and more ambitious of making it terrible. . The grand business is done between the Northern Powers on a footing very convenient for Holland, as it must compel the English to cease interrupting the trade of the neutral Powers. This would be more beneficial to France and Spain than to Holland, by facilitating the acquisition of ship timber, hemp, and all other things for the supply of their arsenals of the Marine. A principal branch of the British policy has ever been to prevent the growth of the navies of their enemies by intercepting their supplies. . . . The greatest number [of the ships under the Dutch convoy in 1799] have escaped and have carried to France the most efficacious succours of which she stood in the greatest necessity.
>
> "The principle which the English contend for has no other foundation but the insular position of Great Britain, and the convenience of that nation. The principle which the neutral

Powers are contending for is evidently laid in the common good of nations, in the ease, safety, convenience, happiness, and prosperity of mankind in general. But we shall see whether obstinacy and fierce passions will at length give way in one instance. At present there is no appearance of it."

In the early days, before France had actually declared war, the views of the Commissioners were more practical. British commerce was suffering greatly from the American privateers; and insurance was so high that British goods could not compete in foreign markets on equal terms with the French and Dutch. Very ingeniously they hit on the expedient of shipping goods abroad in French bottoms; for France then professed neutrality, and, still maintaining a show of friendship with England, could not protest. The Americans, in their turn, proposed to counter the practice by acting on the old maritime law, and seizing the enemy's goods on these neutral ships:—

"As we have yet no treaty with France, or any other Power, that gives to free ships the privilege of making free goods, we may weaken that project by taking the goods of the enemy wherever we find them, paying the freight. And it is imagined that the captains of the vessels so freighted may, by a little encouragement, be prevailed on to facilitate the necessary discovery."[1]

The Committee of Foreign Affairs was also much exercised, and instructed the Commissioners to request "that either this commerce should be prohibited, or that the United States be at liberty to search into, and make distinctions between, the bottom and the enemy's property conveyed in that bottom."[2]

The French, however, disliked search of their ships by Americans, although their own law would have sanctioned it, and the counter-project came to nothing.

[1] Commissioners to Committee of Foreign Affairs, September 8, 1777.

[2] Committee of Foreign Affairs to Commissioners, October 18, 1777.

VI

THE FIRST ARMED NEUTRALITY, 1780

THE position of England after France and Spain had openly espoused the cause of the American Colonists in 1778 was one of extreme danger. She stood alone in the world facing open enemies and discontented neutrals, with a common bond of grievance, real or imaginary. The question between her and the neutrals entered a phase known as "Armed Neutrality," the principal characteristic of which was the reinforcement of the old claims to free trading by a code of new principles, the manifest tendency of which was to assist the enemy.

When the war broke out in Europe, the trading activities of the neutrals immediately revived; and England was compelled to take the most rigorous measures at sea to prevent cargoes of what she called contraband of war, but the neutrals "innocent" consignments of ships' masts, timber, and naval stores, reaching the French dockyards from the Baltic ports. In 1778 it was well known that great quantities of timber were to be despatched from the Texel. In spite of diplomatic representations the Dutch persisted in despatching it under convoy; it was met in the Channel by seventeen ships-of-the-line, and, after an exchange of broadsides, the Dutch flag was hauled down.

The danger of the position was aggravated by "some grievous and unexpected successes obtained by the colonies," which had "given a degree of strength and consistency to their rebellion." The project of an alliance with Russia, often proposed, took a more insistent shape; and Sir James Harris, afterwards first Earl Malmesbury, who had been sent to Petersburg in 1777, received special instructions to propose to the Empress Catherine the conclusion of an offen-

sive and defensive alliance. Mr. Wroughton, Minister at Stockholm, and Mr. Morton Eden, Minister at Copenhagen, were instructed to make similar proposals to their respective Courts.

The story of the negotiations with the Empress is an interminable one, and it must be condensed into a short paragraph. The real motive of the proposed alliance was to obtain the assistance of a Russian fleet. The reason put forward was that the interests of Russia and Great Britain in resisting the aggression of the House of Bourbon, and in preserving the peace of Europe, were identical. The proposal, however, excluded Catherine's quarrel with Turkey from the *casus fœderis*; for commercial reasons Great Britain would not break with the Porte. It was foredoomed to failure, for the Empress would obtain no assistance in the only war in which she was likely to engage on her own account, but would be required to side with Great Britain in the impending struggle with France and Spain, with whom, although she was not on the best terms, she had no definite quarrel. In a friendly memorandum she declined the alliance on these conditions on every occasion when the Ambassador pressed it on her, though in the end the suggestion that Minorca might be ceded to Russia almost altered her resolution.

During these negotiations the Scandinavian Powers were loud in their protests against the British seizure of their ships laden with ships' timber and naval stores consigned to France, and, instigated by de Vergennes, in 1778 had made overtures to Catherine to create a joint fleet for the mutual protection of their commerce. The policy of Versailles was to persuade the neutrals to maintain a "strict neutrality," by which was meant a vigorous defence of their flag. To promote this end the regulation of July 1778 was issued, promising a recognition of "free ships free goods," on condition that the neutrals should compel Great Britain to observe the same principle. In no other way could the timber and stores necessary to maintain the French fleet be obtained.

Meanwhile, the American privateers had been doing much damage on the trade route to Archangel; and Catherine determined to protect Russian commerce, whether it was carried in Russian or neutral ships in the northern sea. The Scandinavian proposal of a joint fleet for mutual protection was rejected, and there was substituted for it a plan of co-operation for individual purposes, each country to protect its own commerce. Catherine's own action had the effect of keeping the northern seas clear of American privateers. This was looked on by de Vergennes as a favour granted to Great Britain; his large plan had miscarried. The first phase of the Armed Neutrality went no further than this. But in due course Russian vessels carrying consignments to France of stores from the French merchants in Russia were seized by the British cruisers; and Catherine requested that special orders should be given that Russian ships should be allowed to pass free. It seems clear that some degree of favour was shown them, but the order for absolute immunity was refused.[1] Spain also seized enemy goods on neutral ships, declaring that she was compelled to act in the same way as Great Britain.

The seizure by Spain of two Russian ships, bound for Malaga with corn, for an alleged breach of the blockade of Gibraltar, brought matters to a head; and the suggestion of the Scandinavian Powers of an armed neutrality of the Northern Powers suddenly materialised. In March 1780, Catherine issued a Declaration to the three European belligerents, setting out four principles for regulating maritime warfare on which it was her intention to insist.

The Empress dwelt on "the rights of neutrality, and the liberty of universal commerce." Her confidence that her subjects during the war "would peaceably enjoy the fruits of their industry, and the advantages

[1] The instructions to the Fleet did, however, recognise the definition of contraband contained in articles X and XI of our Treaty with Russia of June 20, 1766. (Council Register: 18 Geo. III.).

belonging to a neutral nation" had been misplaced. There had been hindrances to the liberty of trade in general, and to that of Russia in particular. It was Catherine's intention to free that trade by all means compatible with her dignity, and to prevent any future infringements. She therefore "thought it but just to publish to all Europe the principles she means to follow which are the properest to prevent any misunderstandings, or any occurrences that may occasion it." She "finds these principles coincident with the primitive right of nations which every people may reclaim, and which the belligerent Powers cannot invalidate without violating the laws of neutrality, and without disavowing the maxims they have adopted in the different treaties and public engagements." The principles "are reducible to the following points, which are to serve as rules for proceedings and judgments upon the legality of prizes":—

"*First*, that all neutral ships may freely navigate from port to port, and on the coasts of nations at war.

"*Secondly*, that the effects belonging to the subjects of the said belligerent Powers shall be free in all neutral vessels, except contraband merchandise.

"*Thirdly*, that the Empress, as to the specification of the above-mentioned merchandise, holds to what is mentioned in the tenth and eleventh articles of her treaty of commerce with Great Britain, extending these obligations to all the Powers at war.

"*Fourthly*, that, to determine what characterises a port blockaded, this is only to be understood of one which is so well kept by the ships of the Power which attacks it, and which keep their places, that it would be dangerous to enter."

In making these points public, the Empress did not hesitate to declare that to maintain them, and to protect the honour of her flag, and the security of the trade and navigation of her subjects, she had put into commission "the greatest part of her maritime forces"; but this would not influence "the strict neutrality she has sacredly observed, and will observe so long as she is not provoked and forced to break the bounds of moderation and perfect impartiality. It is

in this extremity that her fleet will have orders to go wherever honour, interest, and need may require." Finally, she promised herself "that the belligerent Powers, convinced of the sentiments of justice and equity which animate her, will contribute to the accomplishment of her salutary views, which manifestly tend to the good of all nations, and to the advantage even of those at war."

The Declaration was communicated to Sweden and Denmark; and, in answer to certain questions put by Sweden as to the procedure to be followed, Russia explained that protection and mutual assistance were to be arranged for by a convention to which all other neutrals would be invited to adhere, "the principal object of which is to ensure a free navigation to the merchant ships of all nations."

> "Whenever such vessel shall have proved from its papers that it carries no contraband goods, the protection of a squadron, or vessels of war, shall be granted her, under whose care she shall put herself, and which shall prevent her being interrupted. From hence it follows that each Power must concur in the general security of commerce."

The explanations concluded with this sentence:—

> "It is probable that this convention, once ratified and established, will be of the greatest consequence; and that the belligerent Powers will find in it sufficient motives to respect the neutral flag, and prevent their provoking the resentment of a respectable Confederacy, founded under the auspices of the most evident justice, and the sole idea of which is received with the universal applause of all impartial Europe."

Answers were received from the three belligerents. Spain declared that it was entirely owing to the conduct of England, both in the present and the last wars ("a conduct wholly subversive of the received rules among neutral Powers") that she had been compelled to act in similar fashion by way of reprisals. The conduct complained of was that the English paid "no respect to a neutral flag, if the same be laden with effects belonging to the enemy." It was, however, pointed out that the neutrals had laid themselves open to the inconveniences they had suffered, by furnishing

themselves with double papers and other artifices to prevent the capture of their vessels. Nevertheless, the King of Spain

> "will once more have the glory of being the first to give the example of respecting the neutral flag of all the Courts that have consented, or shall consent, to defend it, till His Majesty finds what part the English Navy takes, and whether they will, together with their privateers, keep within proper bounds."

In the French answer, which was in the following terms, the formula "The Freedom of the Seas" appears in a public document, I believe, for the first time:—

> "The war in which the King is engaged having no other object than the attachment of His Majesty to the freedom of the seas, he could not but with the truest satisfaction see the Empress of Russia adopt the same principle and resolve to maintain it. That which Her Imperial Majesty claims from the belligerent Powers is no other than the rules already prescribed to the French marine, the execution of which is maintained with an exactitude known and applauded by all Europe.
>
> "The liberty of neutral vessels, restrained only in a few cases, is the direct consequence of neutral right, the safeguard of nations, and the relief even of those at war. The King has been desirous not only to procure a freedom of navigation to the subjects of the Empress of Russia, but to those of all the States who maintain their neutrality, and that upon the same conditions as are announced in the Declaration to which His Majesty this day answers.
>
> "His Majesty thought he had taken a great step for the general good, and prepared a glorious epocha for his reign, by fixing, by his example, the rights which every belligerent Power may, and ought to acknowledge to be due to neutral vessels. His hopes have not been deceived, as the Empress, in avowing the strictest neutrality, has declared in favour of a system which the King is supporting at the price of his people's blood, and as Her Majesty claims the same laws that he would wish to make the basis of the universal maritime code."

The "great step for the general good" was the adoption of "free ships free goods" by the regulation of July 1778. France, however, still adhered to the principle "enemy ships enemy goods." The books throw no light on the question why the neutrals did not protest against *this* principle of seizure. It may

well be that to seize neutral property on enemy ships can be justified, like the English principle of seizure, on the broad ground that it prevents neutral assistance to the enemy of a peculiarly insidious kind. But it was, like the English principle, an interference with the liberty of universal commerce, a disturbance of neutral subjects in the peaceable enjoyment of "the fruits of their industry and the advantages belonging to a neutral nation"; it was a "hindrance to the liberty of trade in general"; and one would have thought that the Empress would find herself obliged to free that also "by all means compatible with her dignity and the well-being of her subjects." Yet this question was not dealt with in the four points of her Declaration; and thus the Ministers of Louis XVI were able to assert in their answer a complete regard for the neutral flag, but to ignore all questions of regard for neutral commerce.

We now come to the British answer to the Empress Catherine. As published in all the books, it was very simple. It declared that the King had acted towards neutrals according to the principles of the Law of Nations; that he had given special orders to pay to the Russian flag the regard due to it by that law and by treaty engagements; and that, if any irregularities happened, they would be redressed in an equitable manner by the Court of Admiralty.

This answer has been praised as being couched "in terms of studied courtesy." But Sir James Harris, writing in 1782 to Lord Grantham, described it as "ambiguous and trimming," and declared that we seemed equally afraid to accept or dismiss the "new-fangled doctrines." This view is quoted by Mr. Fiske, a more acid historian of the American Revolution than Bancroft, to reinforce his comments, that "the immediate effect of the Armed Neutrality was to deprive England of one of her principal weapons of offence"; and that

> "this successful assertion of the rights of neutrals was one of the greatest and most beneficial revolutions in the whole

history of human warfare; was the most emphatic declaration that has ever been made of the principle that the interests of peace are paramount and permanent, while those of war are subordinate and temporary. In the interest of commerce it put a mighty curb upon warfare, and announced that for the future the business of the producer is entitled to higher consideration than that of the destroyer. Few things have ever done so much to confine the area of warfare and limit its destructive power."

This is typical of the view very generally prevalent in regard to the Armed Neutrality, not only in foreign countries, but also in England. The official opinion of most foreign countries probably coincides with Sir William Molesworth's statement in the House of Commons, in a speech in 1854, that the Armed Neutrality "attained its object"! There can be little doubt that English opinion has been in large measure based on, and continental opinion confirmed by, the Malmesbury Correspondence; for the letters of Lord Malmesbury to different Foreign Secretaries and to personal friends abound in criticisms of the action of the British Government, and refer to advice given by him but not followed by his superiors. These volumes have long been accepted as faithful historical records, for they contain official despatches. But these are only extracts, and are often inaccurate; important despatches are omitted, in particular the despatch from Lord Stormont, conveying the instructions to the Ambassador as to action to be taken on Catherine's Declaration.

In view of what has been said as to the prevailing opinion of England's attitude, the exact instructions sent by Lord Stormont are important. The answer that has been published was to serve as a dummy, though for very inadequate reasons. But the real instructions contained a well-reasoned argument against the "free ships free goods" principle, together with a collection of authorities, beginning with the *Consolato del Mare*, which were to be, and in fact were, presented to Catherine and her Ministers. There are references in other Foreign Office despatches relating to this ques-

tion, which are conceived in the same spirit, that in no circumstances could the principle be assented to:

"We cannot, and shall not, subscribe to such doctrine, I have repeatedly told you."

After references to the uniform friendship of the Empress to England, and to the just resentment which she had expressed at the unwarrantable conduct of Spain (in connection with the seizure of the Russian vessels), which make it impossible to suppose that she can have the least intention of throwing difficulties in our way, the despatch proceeds:—

"And yet the style of the Declaration does carry an appearance which our enemies will endeavour to make use of to our disadvantage.

"The second article (that free ships make free goods), as you will see at once, proceeds upon a mistake, and lays down, as a principle of the Law of Nations *that* which is a manifest variation of that law which some States have agreed to make by particular specifick engagements. It is established by the concurrent opinion of the best writers upon the subject and by the constant uniform decisions of, I believe, every Court of Admiralty in Europe, that, according to the Law of Nations, the goods of an enemy, whether contraband or not, when found on board a neutral ship, are legal prize, and the lawful goods of a friend on board an enemy's ships are free, and consequently, if taken, must be restored.

"Particular treaties, as our treaty with Portugal in 1654, and that with Holland in 1674, have inverted the rule, and have, by express stipulation agreed that the flag of the contracting Powers shall cover enemy's property, excepting contraband, and that their property on board an enemy's ship shall be deemed lawful prize. But this is, as I have already said, a direct, positive, specifick engagement. Such engagements form the exception; and the general principles of the Law of Nations constitute the rule that applies to all cases where there is no particular treaty. All that any neutral Power can, or ever did claim, is the observance of the general Law of Nations, where there is no treaty; and the accomplishment of particular specifick engagements, where such engagements exist. They do exist between this country and many others, but they are different with different Courts, and consequently are not reducible to one measure or rule.

"As you may not have the books by you, I inclose a note of the passages from different writers in support of the abovementioned doctrine, which indeed is indisputable. How the

mistake in the second article of the Declaration arose I cannot pretend to say. I suppose it to be a wilful one, and made with a very bad design.

"As it would be awkward in an answer to so friendly a Court as Russia to enter into anything that had the appearance of discussion, and as it is absolutely impossible to accept a principle that is in direct contradiction to the uniform decisions of the Court of Admiralty of this and every other country, from time immemorial, it was thought better to make the inclosed answer in general terms. Before you present it to Count Panin you will, if possible, contrive to explain to Her Imperial Majesty the objections there are to some of the positions of the Declaration, particularly to the second article. This is a matter of nicety and must be done with delicacy and address."

After further examination of the question, the instructions continue:—

"As soon as you have prepared the way by this explanation, you will present the inclosed answer to Count Panin, and accompany it with the strongest assurances of the King's constant and invariable friendship for the Empress, and of his entire reliance on that of Her Imperial Majesty. . . . It will not, I think, be expedient to enter with Count Panin into any particular discussion of the second article of the Declaration, unless he should force you to it, but, at all events, you will take the greatest care not to drop a syllable that can be construed into an acquiescence in the erroneous doctrine which that article endeavours to establish, and to which it is impossible to subscribe."

Declarations were also presented to the belligerents by the Kings of Denmark and Norway and of Sweden. The former stated that—

"the neutral navigation has been too often molested, and the most innocent commerce of his subjects too frequently troubled; so that he finds himself obliged to take proper measures to assure to himself and his Allies the safety of commerce and navigation and the maintenance of the inseparable rights of liberty and independence. . . . A nation independent and neuter does not lose by the war of others the rights which she had before the war, because peace exists between her and all the belligerent Powers. Without receiving or being obliged to follow the laws of either of them, she is allowed to follow in all places (contraband excepted) the traffick which she would have a right to do if peace existed with all Europe as it exists with her. . . . The King cannot accord [? accede] to the principle that a Power at war has a right to interrupt the commerce of his subjects."

The English reply relied on the treaties existing between England and Denmark, in which the reciprocal rights and duties of the two Powers had been traced. These treaties had always been, and would continue to be, respected as an inviolable law for both the one and the other.

The treaty of alliance and commerce between the two Powers had been made in 1670; and on July 4, 1780, that is, after the Russian Declaration had been received and answered, and only four days before the Danish Declaration was issued, the articles (of 1670) relating to contraband had been revised. In the new article (1780) the following were declared to be contraband:—

> "Ship timber, tar, pitch and rosin, sheet copper, sails, hemp and cordage, and generally whatever immediately serves for the equipment of ships; unwrought iron and deal planks, however, excepted."

The Swedish Declaration referred to the Russian document with approval, and concluded thus:—

> "The King . . . will enjoin all his subjects under rigorous pains, not to act in any manner whatever contrary to the duties which a strict neutrality imposes unto them; but he will protect their lawful commerce, by all possible means, whenever they carry on the same conformably to the principles here above mentioned.

The English answer referred specifically to the twelfth article of the treaty between England and Sweden of 1661, which was in these terms:—

> "If the goods of an enemy are found in a ship of the Ally, that part only belonging to the enemy shall be made prize; and that part belonging to the Ally shall be immediately restored."

This article, therefore, expressly recognised the right of one of the parties to the treaty ("ally" or "confederate," which is sometimes used, merely means party to the treaty), being at war, to seize enemy goods on the ships of the other party; the reason given in the treaty being lest the freedom of navigation or passage of the subjects of one party "should be of detriment to the other while engaged in war on sea or land with

other nations, and lest the goods and merchandise belonging to the enemy should be concealed." This provision, as well as the reason for it, were repeated and emphasised in the treaty of 1666.

A scurrilous story was started in Stockholm that this paragraph did not exist in the original treaty, but had been deliberately and fraudulently interpolated by the British Government for the purposes of the answer. The charge was, it is hardly necessary to say, groundless; but the copies of the treaty are very defective,[1] and in the Swedish Government copy this clause did not exist. There is, however, abundant internal evidence from the treaty itself, as well as from the treaties of 1654 and 1656, that it was intended to authorise the seizure of enemy goods on neutral ships. The question is referred to because the charge was repeated in a work dealing with the Armed Neutralities published in 1893.[2]

The "Convention for an Armed Neutrality" was concluded on June 28, 1780. It declared, among other things, that these Powers would "enforce the most rigorous execution of the prohibition against contraband commerce of their subjects with any Powers at present engaged in war, or who may hereafter be engaged therein." To avoid all ambiguities and misunderstandings with regard to contraband, they declared that they would "only acknowledge such articles to be contraband commodities as are included and mentioned as such in the treaties now subsisting between their respective Courts and the one or other of the belligerent Powers"; and that it is their "will and intention" that "all other commerce shall be and remain free." Further, having claimed in their Declarations "the general principles of natural right, of which the liberty of commerce and navigation, as well as the rights of neutral nations, are a direct consequence,

[1] See note to the treaty in Dumont, *Corps Diplomatique*, Vol. VI, pt. 2, p. 384.

[2] Dr. Fauchille, *La Diplomatie Française et la Ligue des Neutres de* 1780. Paris, 1893.

they have resolved not to let them any longer depend on arbitrary interpretation suggested by independent and momentary interests." After stating the four principles, they declared that "these stipulations shall be considered as permanent, and serve as a law in matters of commerce and navigation, whenever there shall be a question of appreciating the rights of neutral nations."

Other Powers equally neutral were to be allowed to adhere. Holland adhered in 1780; Prussia, with some modifications of detail, in May 1781; the Emperor Joseph II in October of that year; Portugal in July 1782; and the Two Sicilies in February 1783.

Separate articles were signed between Russia, Denmark, and Sweden on the same day as the Armed Neutrality Convention, declaring that these Powers, being equally interested in safeguarding the tranquillity of the Baltic, would continue to maintain that it was a closed sea wherein all nations "doivent et peuvent naviguer en paix." They would also maintain the tranquillity of the North Sea "dans leurs parages."

The documents in which the pretensions of the First Armed Neutrality were put forward enable us to understand what the claim of "Freedom of the Seas" at this time really meant. The propositions involved in it are there definitely stated. In general terms they sought to secure "the safety of commerce and navigation." But the major proposition was this: "a nation independent and neuter does not lose by the war of others the rights which she had before the war, because peace exists between her and all the belligerent Powers." The conclusion was that, therefore, "a Power at war has no right to interrupt the commerce of the subjects of a neutral Power," except always in contraband and with blockaded ports.

The insidiousness of the proposition lies in its simplicity and its assumed innocence, which would appeal to other neutrals who had not yet joined the League. It would also appeal, and does even now appeal, to

those whose temperament is averse from war, and who are prone to advocate principles tending to control belligerent action without going too deeply into reasons which make that action necessary—reasons which depend on the nature of war, and its inevitable consequences. So far as the enemy is concerned, the simpler the statement the better. Anything which would help him to evade the consequences of his adversary's supremacy at sea is welcome.

A few words are necessary in order to make it clear why it was impossible for England to acquiesce in this proposition and the conclusion drawn from it. A sound proposition should be capable of statement without exception. But the principle of freedom of commerce in war cannot be stated unless in immediate conjunction with its exception; and, when the exception of trade in contraband is admitted, the right ceases to be absolute. But this exception in reality governed the principle, because there was no accepted definition of contraband, and therefore the extent of the free commerce was also undefined. The broad generality that it meant "munitions of war" was too vague to be accepted by a maritime Power. The solution of the difficulty was certainly not to be found in insisting, as the Northern Powers insisted, on a definition drawn from treaties to which neither all the neutrals, nor all the belligerents, were parties.

The principle of contraband is as imperfectly understood as the problem which is involved in it. To imagine that "things which are useful in war" are capable of being scheduled with precision was and is obviously fallacious, because it is based on the assumption that finality in defining such things had been reached. But it was radically unsound, because it ignored the ingredients of which these things were made—a lesson only fully learned during the late war.

But this does not touch the root of the discussion of those days. The concession to the belligerent of the right to seize contraband was accepted as inevitable;

but the interest of the neutral made him resist the inclusion of articles which were the staple produce of his country. Thus the question resolved itself into a clash of interests. The question was never stated in quite so simple a fashion; but, resolved into its elements, the contention of each party was that he had a right not to be disturbed in his occupation. The occupation of the belligerent was war, that of the neutral was commerce. England as belligerent contended that the neutral had no *right* to do anything to help the enemy carry on the war; that if he did help him he must do it at his own risk. The neutrals contended that their subjects had a right during war to "enjoy peaceably the fruits of their industry," and that therefore one of "the advantages belonging to a neutral nation" was to sell these fruits to the enemy "peaceably," in other words, without risk.

It is essential to bear in mind that the neutral claimed to deal in the fruits of his industry with both belligerents, and that both belligerents desired to trade with the neutral, especially in such commodities as were essential to warfare. Neither wished to offend the neutrals. While, therefore, the risk could not be eliminated, there was no disinclination to limit its incidence so far as it was consistent with safety in special cases. These influences led to treaty arrangements in which lists of contraband were inserted. They also account for the fact that the lists in different treaties were by no means uniform. Sometimes, for political reasons, one belligerent would acquiesce in the wishes of one neutral, and accord him privileges which he would not grant to another. Despatches of the period make it abundantly clear that the contention of the neutrals as to what was and what was not contraband, outside the narrowest limitation of the term "munitions of war," was governed by their own commercial interests. Commodities which they had to sell they declared were not contraband. This was especially the case in regard to "naval stores," about which the dispute with the Northern Powers

arose. Trade in these stores was a national interest, because the revenues, and therefore the prosperity, of the State depended on it.

No better illustration of the point I have tried to make clear in the foregoing paragraph can be found than the supplementary treaty between Great Britain and Denmark (referred to on p. 52), concluded July 4, 1780, by which the definition of contraband was revised as between those two Powers.

A dispute where each party is actuated by an interest the preservation of which he deems essential is likely to be unending. In this case, however, it does seem possible to determine the merits of the rival contentions. The neutrals held their commercial revenues at a higher valuation than the consequences to England of persisting in that commerce. The fleet was the weapon by which the enemy hoped to win the supremacy of the sea. The safety of the State was involved in the dispute; and it was this which inspired Pitt's rhetorical denunciations of the attempts of the neutrals to assert a freedom for delivering these goods to the enemy. The case on the merits can be stated very simply: whether the existence of one State does not weigh more in the balance than the financial prosperity of another.

It must, however, be recognised that, having established their point to their own satisfaction, the neutrals endeavoured to carry it out logically. This does not eliminate its inherent defects, but it does show that they endeavoured to be faithful, though to a false ideal. In the conventions which they entered into between themselves they declared that they would "enforce the most rigorous execution of the prohibition against the contraband commerce of their subjects"; that is to say, the "contraband commerce" as they understood it. Yet, even from their own point of view, practical difficulties made the scheme impossible of execution; the chief among them being the innate desire of the merchant to evade them, which he was always endeavouring to gratify.

The question of contraband was the third of Catherine's points. The others must now be briefly referred to.

The first asserted that neutral ships might participate in the port-to-port and coasting trades of the enemy. The neutrals thus claimed freedom to participate in the enemy's navigation monopolies; the first point was therefore a direct attack on the "Rule of 1756." It meant increased freights for the neutral shipowners; it also meant palpable benefit to the enemy, and it was impossible for England to accept it.

The second point was that the neutral flag covers enemy cargo, *i.e.*, "free ships free goods." This sought to limit the fundamental principle of maritime war, seizure of enemy property wherever it could be found. Ostensibly it was intended to benefit the neutral carrying trade, but it did in fact create a sanctuary for enemy property under the neutral flag. Contraband was excepted as a matter of course; but the principle would benefit the neutral trader in non-contraband, for it would eliminate all questions as to property in the cargoes seized. Whether the property was in the neutral vendor or in the enemy purchaser, it would be "free."

The first and second principles, taken together, show the full meaning of the "Liberty of Trade" which the neutrals claimed. It was not simply liberty to trade in everything that was not contraband; it was not merely to trade *with* the enemy, but to navigate *on behalf* of the enemy, very skilfully disguised. Obviously England could not accept it.

The fourth point dealt with blockade. In so far as it defined a blockaded port as one "which is so well kept by ships of the Power that attacks it that it would be dangerous to enter it"—in other words, that the blockade must be "effective"—nothing need be said. The sting of the proposal was that the blockading ships must "keep their places." To limit blockade in any way other than in its effectiveness is to limit the restrictions it imposes on neutral trade with the

enemy; and therefore this point, like the other three, is simply answered: whatever the neutrals gained by it the enemy gained also. England's position was that an "effective" blockade could be maintained by cruisers, a far more efficient method for blocking a port than a stationary squadron. The point therefore could not be accepted.

The issue is clearly stated in the Letter of "Historicus" (p. 103), which deals with the Law and Practice of Blockade. The Armed Neutrality endeavoured to establish the principle that the blockading vessels were to be "arrêtés *et* suffisamment proches"; the English doctrine was that they should be "arrêtés *ou* suffisamment proches"; and this was accepted by Russia in the treaty of June 1801, to which Denmark and Sweden adhered.

The answer to these four points cannot be better given than in Pitt's speech, on Mr. Grey's motion for a Committee to inquire into the State of the Nation, on March 25, 1801. The Second Armed Neutrality had at that time come into being, but the principles it advocated were the same as those put forward by Catherine. The speech is the more important because it states clearly the English belligerent practice which the principles of the League endeavoured to nullify.

The speech is reported in Hansard's *Parliamentary History*, vol. 35; but this part of it is only given in summarised form:—

> "Here Mr. Pitt went over the grounds of the question relative to neutral bottoms, denying that free bottoms make free goods, contending that contraband of war ought to include naval as well as military stores, maintaining that ports ought to be considered in a state of blockade when it was unsafe for vessels to enter them, although the ports were not actually blocked up; and denying the right of convoy to preclude neutral ships from being searched. In support of these decisions he quoted the decisions of Courts of Law, and treaties entered into between this country and various other Powers, in which he contended the rights now claimed by this country had been expressly acknowledged."

The extreme importance which he attached to these principles may be gathered from the conclusion of the speech:—

> "Shall we allow entire freedom to the trade of France? Shall we allow her to receive naval stores undisturbed, and to rebuild and refit that navy which the valour of our seamen has destroyed? Will you silently stand by and acknowledge these monstrous and unheard-of principles of neutrality, and ensure your enemy against the effects of your hostility?"

We have now dissected the concrete applications of the vague generalities which the Powers taking part in the First Armed Neutrality put forward. By the "measures to ensure to their subjects that liberty to which they have the most incontrovertible right" which they proposed to adopt, we can test the value of the references to "most innocent commerce too frequently troubled." There was nothing "innocent" about it. It was, on the contrary, most "nocent," for at every point it assisted the enemy.

The points insisted on, the measures proposed to be taken, were the primitive ingredients of the "Freedom of the Seas," which was claimed against England at a time when she was engaged in a life-and-death struggle, and the meaning of it was abundantly clear. It meant the limitation of England's power at sea, which was her one means of defence against her enemies.

VII.

THE PERIOD BETWEEN THE FIRST AND SECOND ARMED NEUTRALITIES

PEACE was signed through the mediation of the Empress Catherine II and the Emperor Joseph II in 1783, at Versailles, between England and France, and England and Spain; at Paris, without mediation, between England and the United States; and with Holland at Paris in 1784.

The mediators had informed the Courts of the League that they intended, previous to signing the treaties to which those Courts were parties, to propose to the belligerents that the four "principles" should be embodied in a Universal Maritime Code, which had, in fact, been drafted. The instructions to the Russian Ambassador in London were limited to proposing, not to insisting on, its acceptance. The proposal was declined by England. The draft Code was then laid aside, and the subject ceased to have any interest.

The statement was made by Sir William Molesworth in the House of Commons in 1854 that the Armed Neutrality "attained its object"; inferring that we were compelled to recognise its principles in these treaties of peace. He also dwelt on the fact that in the same year the United States made a treaty with Sweden which contained the "free ships free goods" clause. The last is a fact, but the first is typical of many erroneous statements on the subject; it is advisable, therefore, to state exactly how the matter stands.

In the Treaty of Versailles with France, the subject was not referred to, but the Treaty of Utrecht and many others were confirmed. The Treaty with Spain is equally silent; but existing treaties were also con-

firmed in which the maxim was recognised. With regard to the United States, it is true that she believed in the doctrine. Her policy was to develop a carrying trade, and the general acceptance of the doctrine would be useful. It was therefore included in her treaties with those States who also approved of it as with Sweden in 1783, and Prussia in 1785. But in the Jay Treaty with Great Britain in 1795, the belligerent right of seizing enemy property on neutral ships is *assumed.* Article xvii contains no more than an agreement that ships detained because they have enemy property on board should be taken to the nearest convenient port, to be proceeded against without delay, and released so soon as the enemy cargo was removed.

The United States during this period never departed from the principle that the Law of Nations warranted these seizures, and that any arrangement to the contrary affected only the contracting parties. When France declared war upon England in 1793, instructions were issued to the British Fleet to detain all vessels loaded with flour or grain bound for French ports; and many American ships were seized and their cargoes for France confiscated. Ignoring their own orders to the same effect, the French Government called on the United States to protest, using the old argument that the inclusion of the maxim in many treaties showed that it was accepted as a principle of international law. President Jefferson instructed the American Minister in Paris as follows:—

> "We have introduced it [the maxim] into our treaties with France, Holland, and Prussia; the French goods found by the latter nations in American bottoms are not made prize of. It is our wish to establish it with other nations. But this requires their consent also as a work of time, and in the meanwhile they [the English] have a right to act on the general principle without giving to us or to France cause of complaint."[1]

[1] The twelfth article of the Treaty with Prussia of 1795 declared that, experience having proved that the principle adopted in Article xii of the Treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the

The Jay Treaty dealt with the question in the spirit of this instruction.

It is necessary now to refer to a few facts connected with the French Revolution. Catherine, struck with horror at the murder of Louis XVI, allied herself with England against the Revolutionary Government. All intercourse between Russia and France was cut off; the ports of both countries were closed against French ships; and all measures were taken for injuring the commerce of France. The two Governments also engaged to unite their efforts to prevent other Powers from giving "any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French, on the sea or in the ports of France."

Denmark was asked to join, but Count Bernstorff refused, declaring that "le droit des gens est inaltérable; ses principes ne dépendent pas des circonstances." In spite of the Revolution, he pointed out that the country, France, still existed, and commercial relations continued; treaties were "frequently" complied with, and the protection of belligerent property by the Danish flag had often been claimed with success.

In view of the action of the Allies, Sweden and Denmark endeavoured to revive the Armed Neutrality. In March, 1794, they concluded between themselves a treaty on the old lines for maintaining their neutrality, and for the mutual protection of the "innocent navigation" of their subjects against those who should disturb the legal exercise of rights, the enjoyment of which could not be denied to neutral and independent nations.

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two last wars, and especially in the one which still continues, the Contracting Parties propose after the return of a general peace to agree, either separately between themselves or jointly with other Powers alike interested, to concert with the great maritime Powers of Europe such arrangements and such permanent principles as may serve to consolidate the liberty and the safety of the neutral navigation and commerce in future wars. The scheme of establishing a code so soon as the war should be over, like Catherine's, did not mature.

The decrees of the Directory were subject to many variations. On November 15, 1794, enemy goods under the neutral flag were declared liable to seizure until such time as the enemies of France should declare French property free on board neutral ships. This was revoked on January 3, 1795, by a decree which was in its turn repealed on July 24, 1796, by a decree "concerning the behaviour of the French flag towards neutral vessels":—

> "Il sera notifié sans délai à toutes les Puissances neutres ou alliées, que le pavillon de la République en usera envers les bâtimens neutres, soit pour la confiscation, soit pour la visite en préhension, de la même manière qu'elles souffrent que les Anglais en usent à leur égard."

This decree asserted the loyalty of France in respecting treaties which assured commercial advantages to neutral countries, and declared that the same advantages should accrue to France, but that this was hindered by the weakness of the neutrals. The circumstances, therefore, in the opinion of the Directory, warranted the refusal to abide by the treaties.

This view, that the neutrals "suffered" England to exercise what she held to be her belligerent rights, and that it was their duty to oppose them by force, was a principle of the Directory policy which was inherited from de Vergennes. It was the policy which inspired the regulation of July 1778; and it became the text for many of Bonaparte's exhortations to the neutrals later in the war.

In October 1796, a decree was issued prohibiting the importation and sale of English goods.

The position of Holland in regard to France in 1796 is thus summarised by Mahan[1]:—

> "The confidence of the Directors knew no bounds, and they now began to formulate the policy toward British commerce which Napoleon inherited from them. The design was formed of forcing the United States to recede from the obnoxious con-

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[1] *Influence of Sea Power upon the French Revolution and Empire*, Vol. II, p. 247.

ventions of Jay's Treaty; and the Government of Holland, then entirely dependent upon that of France, was pressed to demand that Dutch property on board American vessels should be protected against British seizure, and to suggest the concurrence of the three Republics against Great Britain [U.S. State Papers, II, p. 13]. The Dutch accordingly represented 'that, when circumstances oblige our commerce to confide its interests to the neutral flag of American vessels, it has a just right to insist that that flag be protected with energy'; in other words, that, when the British control of the sea forced the Dutch ships from it, Dutch trade should be carried on under the American flag; and that the United States should fight to prevent the seizure of the Dutch property, although it admitted that the traditional law of nations would not justify it in so doing. On May 6, 1797, Spain also, doubtless under the dictation of France, made the same demand. Similar representations were made to the other neutral country, Denmark. Here is seen the forerunner of Napoleon's contention that, as against Great Britain's control of the sea, no State had a right to be neutral. Soon afterwards the idea was carried further. Denmark was requested to close the mouth of the Elbe to British commerce."

In January 1798, the Directory issued a new decree relating to vessels laden with English goods. The reasons for it were stated in a message to the Council of Five Hundred. The law of October, 1796, was insufficient. Neutral vessels carried on British trade, and even introduced articles of British manufacture into France: "By so doing they aided Great Britain and actually took part in the war."[1] It was, therefore, urgent and necessary to pass a law declaring that "the character of vessels shall be determined by their cargo."[2]

"I.—L'état d'un navire, en ce qui concerne la qualité de neutre ou d'ennemi, est déterminé par sa cargaison; en conséquence tout bâtiment, chargé en tout ou en partie de mar-

[1] Mahan, *op. cit.*, Vol. II, p. 249; *see Moniteur*, fol. ed. XXI, p. 443.

[2] The question is too complicated to deal with in this essay, but it is necessary to point out that the common criticism of the Directory, that they launched decrees against English commerce promiscuously, and apparently as the exigencies of the moment prompted them, must be accepted with great reserve.

chandises anglaises, est déclaré de bonne prise, quel que soit le propriétaire des dites marchandises.

"II.—Tout bâtiment étranger qui, dans sa traversée, aura relâché en Angleterre, ne pourra entrer en France si non dans le cas d'une relâche forcée; il en sortira, dès que les causes de la relâche auront cessé."

In the following year, 1799, a debate took place in the *Conseil des Anciens* in connection with the effect of this decree. The commercial condition of France was admitted to be disastrous, and it was attributed directly to the working of this law. A neutral ship, it was said, came within reach of the French coast only at her extreme peril. Neutrals, allies, even French vessels themselves, carrying on the little trade with the neighbouring States, were preyed on by French corsairs. Neutrals being repelled, friendly and even French shipping was scared away, and commerce was seriously crippled for want of carriage.

In 1798 Denmark adopted the policy of convoying her merchantmen, and claimed that a statement from the senior naval officer that the cargoes contained nothing contraband exempted them from the right of search. It is material to note that protective convoys had long been used; and, although a dispute arose in 1778, the First Armed Neutrality did not include this claim among its principles. However, when the ques-

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The more accurate explanation of their decrees I believe to be this: that in nearly all cases they revived principles of the old French law, which was peculiarly severe against the neutrals, though it is probably true that, having taken this law as the basis, they developed its stringency along lines of their own. The decree of 1798 has been criticised, even by Mahan, as something especially iniquitous. The criticism should be directed against the French law on which it was based. The law of 1681 authorised the confiscation of neutral ships which carried enemy property. The character of vessels was thus determined by their cargo; in other words, "enemy goods made enemy ships." The second article of the decree was the original conception of the Directory. But even this was not a breach of International Law. A State has a right, if it choose, to prohibit its ports to foreign vessels. It was a shortsighted policy, and did much harm to French commerce. It was, in fact, one of the causes which led to the failure of the Continental System.

tion was referred by Sweden to Catherine, she declared that it came within the intent and meaning of them. She did, in fact, insert a provision by which the " right of convoy " was agreed to in many treaties concluded after 1782, *e.g.*, those with Demark, Austria, France, Sicily and Portugal.

England refused, as she always had done, to accept the principle; and, when the convoys sailed down Channel, search was demanded. When this was refused, broadsides were exchanged, and many merchantmen, laden with timber and naval stores on their way to France, were seized and taken before the Prize Court. Diplomatic discussions arose in the cases of the Swedish frigate *Ulla Fersen* and the Danish frigates *Freya* and *Havfruen*, which led to the Second Armed Neutrality. They will be discussed below.

The " right of convoy " came before the Prize Court in connection with the seizure of the *Maria*,[1] taken in January 1798 in the Channel. She was one of a fleet of Swedish merchantmen sailing under convoy of a Swedish frigate, carrying pitch, tar, hemp, deals, and iron, to several ports of France, Portugal, and the Mediterranean. Visit and search by a British cruiser were resisted, and she was proceeded against on this ground. The question was elaborately discussed by Sir William Scott, who held that the right of search is an incident of naval warfare, which could not be resisted, even though the convoy were escorted by men-of-war; and that, by the Law of Nations, the convoyed vessels were legitimately seized for resistance, and were, with their cargoes of contraband, good prize. The case went to the Appeal Court, and according to the judgment of Sir William Scott in a later case (the *Elsabe*,[2] 1803), the leading and fundamental positions on which the judgment was based were affirmed.

The French laws, combined with English action at sea, operated disastrously on French commerce; and in 1799 the Directory admitted[3] that "not a single merchant ship under French colours sailed the high

[1] 1 C. Rob. 340. [2] 4 C. Rob. 408. [3] Mahan, *op. cit.* ii, 254.

seas." In November, Bonaparte overthrew the Government and became First Consul.

The relations between Great Britain and the newly-born United States of America during the beginning of the French wars form a separate subject. The activities of the new American mercantile marine were specially directed to trade with the French West Indian Colonies; and, carrying on the tradition of the Seven Years' War, the "Rule of 1756" became, at the outbreak of war in 1793, the basis of the Instructions to the British Fleet. A vigorous attack was made on the French colonial trade, the result of which was that a great number of American ships were seized and condemned.

The Instructions of June, 1793, did no more than authorise the detention of all ships laden wholly or in part with corn, flour, or meal, bound to any port in France, or any port occupied by the armies of France. The ships were to be sent to a convenient port where the cargoes would be purchased by the British Government, and the ships released after a due allowance for freight had been made out of the proceeds of the cargo.

In November of the same year, however, Additional Instructions were issued, under which "all ships laden with goods the produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony," were to be seized and brought in for lawful adjudication. This amounted to a restatement of the Rule of 1756.

The merchants of the United States were the first, and by far the most enterprising adventurers in the new field that was opened to neutrals in the Antilles; and the ports of the French islands were speedily crowded with their vessels. The United States protested, and fresh Instructions were issued in January, 1794, under which the seizures were limited to vessels laden with produce of the French West Indies, "and coming directly from any port of the said islands to any port in Europe." When the goods were the

property of French subjects, they were to be seized, to whatever ports they might be bound.

In order to appreciate the concession made by the new Instructions, it is necessary to bear in mind the point made in the Introductory Remarks, that a claim to "free commerce with the enemy" differs essentially from a claim to "free commerce" pure and simple; and that the maintenance of the latter is perfectly consistent with the destruction of the former. There was a genuine market for the West Indian produce in the United States, especially coffee. It was never the policy of England to interfere with purely neutral trade; such interference could not be justified in any circumstances. This American trade with the French colonies was, however, not neutral trade with neutral; it was trade with the enemy; but it was for neutral consumption, and, in order to preserve good relations with the Americans, the concession was made.

The Instructions must be studied in the light of the truism, that a belligerent is not bound to have recourse to his full power at any time, or at all, during a war; therefore, what he *may* do is not necessarily to be judged by what he actually does. Some powers may be held in reserve; the exercise of extreme rights may be waived. The issue of the Instructions of 1794 is not, therefore, to be construed into an admission that the American protest against those of November 1793 was justified. It was a concession, and nothing more.

At this point the difficulties in the relations between Great Britain and the United States began to be intensified, and what came to be called at the time "Frauds of the Neutral Flag" developed rapidly. The second provision of the Instructions maintained the traditional principle of belligerency—the seizure of enemy property on neutral ships. We have it on the testimony of James Stephen, who wrote in 1805, that "it was evident that the flag of the United States was, for the most part, used to protect the property of the French planter, not for the American merchant."[1]

[1] "War in Disguise; or, the Frauds of the Neutral Flag" (1917 Ed.), p. 19.

This was, however, only one method of evading the British cruisers which the connivance of the neutral trader suggested. The concession itself was full of commercial potentialities which the American traders were quick to seize. Coffee and other colonial produce were in as great demand in Europe as in the States; they could be imported freely into the United States; they were simply re-exported to France and the Continent, "the broken voyage being considered to purge the origin of the commodities." Mahan says that, "debarred from going with it direct to Europe by the Rule of 1756, the rise in price, due to diminished production and decrease of transport, allowed them to take the sugar and coffee of the colonies at war with England to American ports, re-ship it to the Continent, and yet make a good profit on the transaction."[1] This was the germ of that devious method of getting cargoes to the enemy which was subsequently developed to such an extent as to lead the Prize Court to enunciate the doctrine of "continuous voyage," of which, a few years later, we were to hear so much.

The friction between the two countries having become acute, the United States proposed their adjustment by treaty; and John Jay was sent as envoy to England. The treaty, concluded in November 1794, was not ratified till October 1795. American ships had, by the Instructions of January 1794, the privilege of direct trade between their own country and the British East and West Indies, but they were precluded from carrying the produce of those colonies to other foreign ports. A provision had been introduced into Art. XII of the treaty, which would have stopped the practice of the broken voyage by which they sought to evade the effect of the Instructions; but the Senate rejected it, and the treaty was ratified without it.

In 1798 fresh Instructions were issued, and a further concession was made. Vessels laden with the produce of enemy colonies were to be seized "coming directly from any port of the said islands or settlements to any

[1] Mahan, *op. cit.*, Vol. II, p. 253.

port in Europe, not being a port of this kingdom, nor a port of that country to which such ships, being neutral ships, shall belong." There was the same proviso as in 1794 for seizure of cargo on neutral ships when it belonged to enemy subjects, " to whatever port the same may be bound."

The special exception thus introduced was in favour of British ports, and was devised to carry out Pitt's policy of making England the store-house and toll-gate of the world's commerce. Its result was to make deviation at an American port unnecessary. The deviation to the Continent now occurred in England; the re-exportation which had been contrived at such a port as Marblehead could now be contrived at such a port as Plymouth.

The Instructions with their concessions, the commercial policy which prompted them, the attempt of the American trader still to evade the restrictions and to gain further concessions, form a special theme which does not fall within the compass of this Memorandum. It culminates in the doctrine of " continuous voyage," and, when that in its simple form proved too weak to check the ingenuity of the neutral merchant, in the evolution of the auxiliary doctrine of " common stock," which was made the test of a genuine importation into the neutral country.

The subject does, however, hold a definite place in the historical evolution of the spurious " Freedom of the Seas "; and it is, perhaps, the best illustration of the motive of the neutral which underlies it, to secure the profit resulting from a successful voyage—successful that is, in getting his goods to the enemy, in spite of the obstacles created by the belligerent; and of the motive of the enemy in supporting the doctrine, to secure the successful landing of the cargoes.[1]

[1] The limitations attached by the late Professor Westlake (in his work *International Law—War*, 2nd edn., p. 293) to the principle of continuous voyage may be referred to here in order to enter a *caveat* against doctrines which, if they were true, would make the principle worthless and reduce sea-power to impotence.

VIII

THE SECOND ARMED NEUTRALITY, 1800

THE foregoing survey of the events which happened between the outbreak of war in 1793 and the end of the eighteenth century will serve as an introduction to the consideration of the causes which led to the formation of the Second Armed Neutrality. It sprang directly out of the convoy question, its principal feature being the emphasis laid on the inviolability of the neutral flag, behind which, as a screen, stood the old claim to freedom of trade with the enemy. England did not deny the sanctity of the neutral flag. But she did deny that, with the question of ships' timber and naval stores unsettled, the neutral flag could protect these disputed cargoes on their way to the enemy.

The "right of convoy" *per se* is not a very troublesome question. It is based on the existence of a prohibition by a neutral Government to its merchants against shipping contraband, and requires the acceptance of a statement by the commander of the escort, after due examination, that there is no contraband on the convoyed ships. With the question of contraband not merely unsettled, but very much in dispute, it was obviously impossible for England to acquiesce in the contention. But the Armed Neutrality principle was specially unpractical, because it contemplated mutual convoys; and therefore the statement of a Russian officer was to be accepted as to goods on board, say, a Swedish ship. The "right of convoy" was a direct counter to the "right of search"; as an auxiliary to the contraband dispute, it was no more than an ingenious method of getting round it.

The neutrals displayed further ingenuity in putting forward their case. In the voluminous correspondence which followed each seizure of their ships the real question in dispute—whether ships' timber was contra-

band—was hardly, if at all, mentioned. To assert the inviolability of the neutral flag, and complain of the "insult" involved in visit and search, was therefore to assume a dispute to be settled which was not settled. The same flag hoisted on a warship did not improve the position. But the presence of the warships led to firing, and compelled England, in her turn, to complain of forcible resistance to the search. Thus there was also an "insult" to the English flag. It had been fired on when peace existed between the two countries. Each country, therefore, demanded apology and reparation from the other.

It will be useful to quote a caustic remark upon the convoy question by M. de Martens, the impartial and dispassionate collector of diplomatic documents. Alluding to the decrees of the Directory issued in 1798, referred to in the last chapter, he says[1]:—

> "However revolting these decrees, they were tolerated by the Northern Powers; at least no alliance was formed to resist them. But they sufficed for Denmark and Sweden to increase the number of these convoys, even in the seas in which they had not done so before, and where they had less to fear from France than England. Measures legitimate in themselves, but which had never been regarded with favour by belligerents."

England contended that "the right to visit merchantmen at sea is an incontestable right of a nation at war. Resistance to a friendly warship must be construed as an act of hostility."

The Danish contention (case of the *Havfruen*) may be thus summarised: The right of visit is recognised by custom and treaties; it is not a natural, but a purely conventional right; and it cannot be extended arbitrarily beyond what has been agreed or accorded. No Power has ever admitted the right to visit ships under escort; they could not do so "sans dégrader leurs pavillons, et sans renoncer à une partie essentielle de leurs propres droits." Far from acquiescing in this hitherto unknown pretension, the majority of the

[1] De Martens, *Recueil*, Supplement II, p. 346.

neutral Powers have thought it right to enunciate the opposite principle in their conventions with the most respectable Courts in Europe. The distinction made between convoyed and non-convoyed ships is as just as it is natural. The right of visit in respect of non-convoyed ships is limited to verification of their flags and examination of their papers, in order to establish their neutrality, and the regularity of their bills of lading. If these are in order, further visit is illegal. Thus the authority of the Government which issues them ensures the requisite security for belligerents. When that Government convoys its merchantmen, it offers to belligerents a more authentic guarantee than is afforded by the papers, and it cannot consistently with its honour admit of doubts and suspicions, injurious to itself and unjust on the part of those who raise them.

To the suggestion that some small neutral State might cover illicit commerce by its flag, it was answered (case of the *Freya*): "a suspicion of such vile conduct is as injurious to the Government creating it as to the one which did not merit it. The officers have made themselves personally responsible that the convoy contains no contraband; and it is easy to see that it would be more difficult to escape the vigilance of such officers than of those who pretend to exercise the illusory and odious right of search."

It is not necessary to refute this argument piecemeal. It was a fact that many neutrals had thus limited the right of search among themselves in their treaties by interposing the escort of a warship; but it was equally true that these treaties had been entered into with the express object of supporting this contention after the affair of the Dutch convoy in the Downs in 1779. The facts remained that the merchantmen were full of ships' timber and naval stores for France, or it would not have been worth while risking a naval engagement; and that England did not and could not admit that they were non-contraband.

The British answer (case of the *Havfruen*) may be condensed into one sentence:—

> "The honour of the King's flag has been insulted almost within sight of his coasts, and this action has been sustained by contesting indisputable rights, founded on the most evident rights of nations; from which rights His Majesty will never depart, but the moderate exercise of which is indispensably necessary for the maintenance of the dearest interests of his Empire."

In August, 1800, Lord Whitworth, supported by a squadron under Admiral Dixon, was sent to Copenhagen to negotiate an amicable arrangement. Denmark seems then to have recognised the essential difference in the fundamental principles asserted by her and Great Britain, and proposed arbitration by Russia, "which is friendly to both States." The answer was that "there is no Sovereign in whom Great Britain has greater confidence than the Tsar. Nevertheless, it is hoped that Denmark will so act as not to render it necessary." The result of the negotiations was that a preliminary convention was signed at Copenhagen on August 29, by which the *Freya* was released, and Denmark agreed to suspend her convoys until a definite convention was entered into.

The alliance between England and Russia was still in force; but the glamour of Bonaparte's genius and military successes had begun to fascinate the Tsar Paul, and his friendship for England was gradually weakening. The appeal of the neutrals over the convoy question led him to follow his mother's example, and he issued a Declaration to the neutrals based on Catherine's, inviting them to renew the Armed Neutrality.

The Declaration opened with a flamboyant reference to the Declaration of 1780, to which it was alleged that Europe had given its approbation. It then referred to the case of the *Freya*. The Tsar believed that the King of England would disapprove this violation of the Law of Nations and of the principles of neutrality. Nevertheless, in order to

prevent the recurrence of such acts of violence, it was necessary to re-establish the basis of neutrality, "so that the neutral nations may enjoy the fruits of their industry, and not be subject to arbitrary measures of belligerents, and therefore to re-establish the principles of the Armed Neutrality, and secure the 'Freedom of the Seas.' Russia would employ all necessary force to maintain the honour of its flag."

The dates of the several incidents at this time are a little difficult to follow. With events passing in different parts of Europe allowance must be made for the time taken by the couriers. The Russian Declaration was issued on August 16, apparently immediately after the receipt of the Danish complaint about the *Freya*, without leaving time for the negotiations with England to mature. The English squadron passed the Sound on August 19; and, news of this having in due course reached Russia, Paul immediately ordered the sequestration of English capital in Russia. This was on the 29th, apparently on the same day as the provisional convention was signed between England and Denmark. On the arrival of this fresh news some days later, the sequestration was withdrawn.

On December 4/16, 1800, a convention was signed between Russia and Sweden "to re-establish the Armed Neutrality, which had been adopted with so much success during the American war." It referred to the indestructible principles of neutrality, and the necessity which existed to enforce respect to them, "de rétablir dans son inviolabilité le droit commun à tous les peuples de naviguer et commercer librement et indépendamment des intérêts momentanés des Parties belligérantes." The "maximes bienfaisantes" of 1780 were to be renewed; and the four principles then enunciated were in substance repeated with a fifth added—the "right of convoy."

These principles have already been analysed. It is necessary, however, to re-emphasise what has already been said. All the principles in reality turned on the question of contraband. The League declared

they would recognise as contraband only those "réputés munitions de guerre et navales." The contracting Powers would prevent most rigorously the commerce of their subjects in contraband as thus defined; but "ils entendent et veulent que tout autre trafic soit et reste parfaitement libre." On this basis, and on no other, rested the principle of "free ships free goods." Even if the premisses had been good, the conclusion was hopelessly false. There was no connection between the two propositions. The principles were to be applicable to all maritime wars in the future, and were to be regarded as a permanent guide to the contracting Powers in matters of commerce and navigation, "et toutes les fois qu'il s'agit d'apprécier les droits des nations neutres."

The provisions of this convention were renewed by Russia and Sweden in a treaty of friendship and commerce, March 13, 1801.

A convention in identical terms was entered into on 4/16 December, 1800, between Russia and Denmark, and a similar one with minor alterations on 6/18 December between Russia and Prussia. The mutual accessions of each Power to the other treaties were completed in February 1801.

One other incident in connection with this new Armed Neutrality must be recorded. Catherine's declaration had been addressed to the belligerent Powers; Paul's was addressed to the neutrals. England heard of what was going on, and at once asked Denmark for explanations. The correspondence can best be followed by extracts, which show a curious sincerity on the part of Denmark, probably shared by Sweden, in the principles they advocated. It cannot be said that the English despatches put the case very clearly. The point hinted at above, on which everything turned, was not referred to—granted that trade in all commodities other than contraband was free, granted even an agreement as to what was contraband, how could these propositions establish the freedom of enemy goods on neutral ships? The enemy goods might not

have been the subject of any commercial intercourse with any neutral merchant; the shipowner might be no more than a gratuitous carrier-bailee. No arguments were advanced to prove that one principle followed from the others. Nothing was said on our side to show how remote they were. And yet there was a connection almost studiously kept in the background: the enemy property which the neutrals claimed to carry free was the ship's timber and naval stores they had sold to the enemy. By joining the League, Catherine had said in 1780, the Dutch Republic "secured its navigation and the trading industry of its subjects, which was for the most part carried on in favour of the enemies of England."

The British note to Denmark of December 27, 1800, requested a frank explanation why she was engaged in negotiations hostile to England. There was talk in all Courts of Europe of a confederation between Denmark and other Powers "to oppose by force the exercise of those principles of maritime law on which in great measure the naval power of Great Britain rests." She had waited for Denmark to deny these rumours; but the conduct and public declarations of one of these Powers made it impossible to wait longer.

The Danish answer is dated December 31:—

> "London must have received very inexact information to suppose that Denmark has conceived hostile projects against England, and Denmark is much obliged for the opportunity of denying the rumours in the most positive manner. Negotiations at Petersburg have no other object than to renew the engagements which were contracted in 1780-1781 between these same Powers for the protection of their navigation. Denmark did not hesitate to accept the proposal of Russia, because, far from ever having abandoned these principles, she has supported and claimed them on all occasions, and has never admitted any modifications other than those resulting from treaties with belligerent Powers. Far from wishing to hinder these Powers in the exercise of the rights which war gives them, Denmark only brings to the negotiations views which are absolutely defensive, pacific, and incapable of offending or provoking anyone."

It was then contended that the provisional arrangement which had been entered into at Copenhagen on August 29 (by which the *Freya* had been released) "cannot be opposed to the general and permanent principles which the Powers of the North are on the point of establishing in concert, which far from compromising their neutrality is destined to strengthen it." Denmark hoped that this explanation would "be quite satisfactory, and would cement the ancient friendship." This answer admitted that a treaty was on the point of being ratified which united Denmark to a Power with which England was no longer on terms of neutrality. Her retort was to impose a general embargo on Russian, Danish, and Swedish ships.

The British note explaining the reasons for the embargo dealt with the change in the Russian attitude towards the principles of neutrality; especially emphasising the fact that at the commencement of the present war "Petersburg, which took the leading part in the coalition [of the Northern Powers in 1780] formed an alliance with England, which not only was not in accord with the convention of 1780, but was actually entirely opposed to it." Those engagements were still in force. "The only conclusion possible from the coalition and from the activity of naval armaments, was that the Powers have no other object than to support by force pretensions which so evidently deny justice. The Power which first put them forward in favour of neutrality was also the first to abandon them when she went to war." To which Denmark answered, "The principles of the sacred right of neutrality have never been abandoned. When Russia was at war she simply deferred their application." It was, however, perfectly true to say that Denmark and Sweden had "announced in the face of Europe [that is to say, in 1794] the unchangeableness of the system they had adopted for the protection of all licit commerce."

The Second Armed Neutrality, "a coalition more menacing in appearance than in reality"—came to

an end with the assassination of the Tsar Paul and the defeat of the Danish fleet at Copenhagen. On March 24, 1801, Paul was succeeded by Alexander; and, as the material interests of Russia at that time pointed to peace with Great Britain, a treaty of the first importance was signed on June 5 of the same year, by which mutual concessions on questions of maritime law were made. In the words of Mahan,[1] it

> " permitted the neutral to trade from port to port on the coast of a nation at war, but renounced, on the part of Russia, the claim that the neutral flag covered enemy's goods. On the other hand, Great Britain admitted that property of a belligerent, sold *bona fide* to a neutral, became neutral in character, and as such not liable to seizure; but from the operation of this admission she obtained by a subsequent arrangement the special exception of produce from the hostile colonies. This, Russia conceded, could not be carried directly from the colony to the mother-country, even though it had become neutral property by a real sale; and similarly the direct trade from the mother-country to the colony was renounced. Great Britain thus obtained an explicit acknowledgment of the Rule of 1756 from the most formidable of the maritime Powers, and strengthened her hands for the approaching dispute with the United States. In return, she abandoned the claim, far more injurious to Russia, to seize naval stores as contraband of war."

[1] Mahan, *op. cit.*, Vol. II, pp. 261, 262.

IX

NAPOLEON AND "LA LIBERTÉ DES MERS"

WITH the overthrow of the Directory and the assumption of the government of France by Bonaparte as First Consul, the history of the spurious "Freedom of the Seas" enters a new phase. From a somewhat nebulous doctrine advocated by the neutrals it henceforth takes definite shape and is asserted by the enemy. This formed part of Bonaparte's general policy of taking the neutrals under his wing and compelling them to do his bidding. "As against Great Britain's control of the sea no State had a right to be neutral" (Mahan, II, 247). He even went the length of imagining that he, a belligerent, might be admitted to the League of the Neutrals. We have it in Bonaparte's own words that he sought admittance, but was refused: "La France, qui a déjà proposé d'y entrer et avait été refusée."

This fact has led me to question the statement made in the *Cambridge Modern History* that "the voice was the voice of the Northern League, but the hands were the hands of Bonaparte." This opinion must, I think, have been based on the "friendship" which appears to have been gradually developing between the Emperor Paul and Bonaparte.

But Paul was then almost the declared enemy of England. It is by no means clear that his relations with Sweden were very cordial. Even had he lived, the Second Armed Neutrality would have proved but a rickety machine at the best. But with his assassination it fell to pieces, and the way was clear for Bonaparte to take charge of the neutrals. His first step was to remind the new Tsar of the League and to invite him to

continue its work, indicating that he could not refuse to do so consistently with honour.

> "Si la Russie continuait son système de neutralité armée, dont il ne paraît pas qu'elle puisse s'éloigner avec honneur, la France, qui a déjà proposé d'y entrer et avait été refusée, était encore dans les mêmes dispositions."

In this attempt he was foiled; and the alliance between Great Britain and Russia was restored by the treaty of 1801. From this moment we find in Bonaparte's letters and speeches his authoritative exposition of the "Freedom of the Seas"; and its object is clearly defined. It was to get rid of the supremacy of England on the sea. It was the necessary prelude to assuming it himself, and thus to secure the domination of the world. The shaping of the scheme was begun in a letter to Talleyrand, February 1800. He is to collect as quickly as possible all the facts which would help to establish England's violations of international law. The iniquity of England in the exercise of her domination of the sea was to be the text on which he proposed to preach to the neutrals, exhorting them to activity against his enemy.

The instructions for drafting a note to the Tsar concerning the surrender of Malta contained the following:—

> "Il serait dit dans cette note que le Gouvernement français, ayant principalement à cœur de s'opposer à l'envahissement des mers et de concourir avec les autres Puissances neutres à faire respecter leurs pavillons . . . ne traitera de la paix avec l'Angleterre qu'autant que ces principes sacrés seroient reconnus . . . et qu'il serait reconnu par l'Angleterre que la mer appartient à toutes les nations."

When, in answer to the Russian embargo on English ships, an embargo was imposed on Russian ships in English ports, Bonaparte issued a decree protecting Russian commerce. Talleyrand was to send it to Russia with this explanation:—

> "Que la Russie ne se trouve dans cette disposition contre l'Angleterre que pour la défense des droits de principauté de toutes les nations, et que pour délivrer les mers de cette nation, qui, à elle seule, prétend en être la dominatrice. . Je

désire que S.M.I. voie dans cet acte de propre mouvement la considération et l'estime que j'ai pour elle et pour la grandeur de son caractère."

Napoleon's message to the Senate after the conclusion of the Treaty of Lunéville in February 1801 is conceived in the same strain. Speaking of King George III he says:—

"Tout le commerce de l'Asie et des colonies immenses ne suffisent plus à son ambition; il faut que toutes les mers soient soumises à la souveraineté de l'Angleterre.

"Il arme contre la Russie, le Danemarc, et la Suède, parce que la Russie, la Suède, et le Danemarc ont assuré, par des traités de garanties, leur souveraineté et l'indépendance de leur pavillon. Les Puissances du Nord injustement attaquées ont le droit de compter sur la France. Le Gouvernement français vengera avec elles une injure commune à toutes les nations."

But the projected alliance with Russia, always hoped for, never quite achieved, seemed the surest method of accomplishing his design. "La paix avec l'Empereur," he writes to Joseph, his plenipotentiary at Lunéville, "n'est rien en comparaison d'une alliance qui maîtrisera l'Angleterre et nous conservera l'Égypte." From denouncing England for all her alleged iniquities on the sea he passed easily to the promise of better things in store for the neutrals, which would result from the restoration of the supremacy of France at sea, when the oppression of all seas and of all peoples would come to an end: "L'Europe opprimée n'a plus qu'un désir raisonnable à former, et ne doit placer ses ressources que dans une seule espérance, le rétablissement de la puissance maritime de la France."

The possibility of establishing a naval supremacy and of making good the cry, "Brisons le sceptre de cette Rome de la mer!" had been almost annihilated by the battle of the Nile; and the effect of that victory on the neutrals had to be dissipated. An article was published in the *Mercure de France*, and reprinted in the *Moniteur*, in which the power of the sea was decried and the power of the land extolled. The conclusion was thus boldly stated:—"Jamais donc, la

raison le dit, et l'histoire l'affirme, une puissance maritime n'a triomphé d'une puissance continentale." He had forgotten Richelieu's maxim, "La puissance en armes requiert non seulement que le roi soit fort sur la terre, mais aussi qu'il soit puissant sur la mer."

It was the great dream of Napoleon's life, which, as Mahan points out, ultimately led to his ruin, to unite the Continent against the British Islands, and, as he phrased it, "to conquer the sea by the land."[1] Yet his attention never wandered from the sea question. Free cargoes on neutral ships were still as essential to him as they were to Louis XVI in 1778.

Philosophers had devised another theory, which was more captivating than the rather vague principle of free ships making free goods, namely, that of the immunity of private property at sea. The suggestion seems to have been first made by the Abbé de Mably in a work on "Le Droit Public de l'Europe fondé sur les Traités," published in Geneva in 1774, and appears to have come into vogue among the philosophers who abounded in France at the end of the eighteenth century. This was the weapon which Bonaparte needed, one which was easier to handle than the older maxim with its dubious premiss and its still more dubious conclusion. It invited a larger appeal to the senses by clothing commerce with universal humanitarianism to the complete concealment of profit and loss. Thenceforward Bonaparte used it freely in his attack against England; and it was reinforced by another theory, still more vague, and resting on an inaccuracy—that war on the sea ought to be conducted, in the interest of humanity, according to the same principles as war on land. The second of these principles was merely an auxiliary to the first. The two must be read continuously, thus: Private property should be immune from capture at sea because it is immune from capture on land, since war on the sea should be conducted on the same principles as war on the land. Any attempt to treat the two ideas as independent leads to con-

[1] Mahan, *op. cit.*, Vol. II, p. 271.

fusion, as the debates in Parliament in connection with the Declaration of Paris prove.

The theory of the immunity of private property, and also the auxiliary theory, have been completely demolished by Admiral Mahan in his *War of 1812*, published in 1906. He points out that *private* property is as immune at sea as it ought to be (but is not) on land, and that to take it is common theft, which war does not authorise; but that, when the property of merchants is sent across the sea, whether it be ships or cargoes, it is merged in the larger term "commerce," which is national, because the national wealth depends on it. The theory is, therefore, no more than a device for achieving immunity of commerce, and strikes at the foundation of maritime warfare.

Another important aspect of the question must be noticed. The arguments of the Manchester School, forcibly put by John Bright in the debate in 1862, supported "free ships free goods" as a beneficent principle, but held that it was incomplete. If enemy goods were to be free, there was no reason why the freedom should be limited to those goods on neutral ships; and, if the goods were free, the ships ought also to be free. By this process of reasoning Bright also came to support the "immunity of private property" theory. This argument emphasised the vice of the argument of the supporters of the maxim after it had been introduced into the Declaration of Paris, namely, that "free ships free goods" was a concession to the neutral alone, and did not confer any benefit on the enemy. Lord Palmerston declared that the Declaration of Paris related entirely to the relations between belligerents and neutrals, and that immunity of private property at sea related entirely to the relations of belligerents to each other; that the two doctrines were distinct, and rested on totally distinct grounds. What has already been said on the subject of the maxim is sufficient to show that the contention is unsound. Bonaparte definitely incorporated these two theories into his policy against

England, and formulated them in the preamble of the Berlin Decree, November 21, 1806, which was his answer to the blockade of the French northern coast established in May 1806:—

> "Les dispositions du présent décret seront constamment considérées comme principe fondamental de l'Empire, jusqu'à ce que l'Angleterre ait reconnu que le droit de la guerre est un et le même sur terre que sur mer; qu'il ne peut s'étendre ni aux propriétés privées, quelles qu'elles soient, ni à la personne des individus étrangers à la profession des armes; et que le droit de blocus doit être restreint aux places fortes réellement investies par des forces suffisantes."

This decree was followed by the British Order in Council of January 1807, and this by the first Milan Decree of November 23, 1807. In the preamble of the second Milan Decree of December 17, 1807, the refusal of England to accept "free ships free goods" is referred to, thus linking up all the different theories and doctrines into the main principle they had been devised to support: "Les Anglais . . . . ont profité de la tolérance des gouvernements [neutres] pour établir l'infâme principe que le pavillon ne couvre pas la marchandise." This decree was to remain in force until the British Government "sera revenu aux principes du droit des gens, qui sont aussi ceux de la justice et de l'honneur." We thus return to the point from which we started, the doctrine which the Duc de Bassano's report endeavoured to deduce from the Treaty of Utrecht.

X

ABANDONMENT OF THE ARMED NEUTRALITY PRINCIPLES

In his speech in the House of Lords in 1856 on Lord Colchester's motion expressing regret at the signature of the Declaration of Paris, Lord Derby, replying to Lord Clarendon's defence, said that "all the Powers who entered into this solemn League [the Armed Neutrality of 1780] very soon abandoned their principles—within eighteen years." The importance of the fact is very great, but it requires some explanation.

The main cause was, of course, the complete subversion of all preconceived ideas during the war with Revolutionary France. England was consistent in basing her action at sea on the historic right of seizing enemy property on neutral ships: but her first and immediate ally was Catherine of Russia. In her indignation at the murder of the Lord's Anointed by the "six hundred monsters" who had assumed to govern France, she threw all the principles of the Armed Neutrality to the winds, or, as Denmark interpreted it, "she simply deferred their application." On March 25, 1793, the two Powers entered into an alliance, engaging reciprocally to shut all their ports to French ships, and to take all other measures in their power for injuring the commerce of France; and "to unite all their efforts to prevent other Powers not implicated in the war from giving any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French on the sea or in the ports of France."

To grant the protection of the neutral flag to the property of a belligerent, in other words, to enable that

belligerent to claim the benefit of the principle "free ships free goods," would be within the exact meaning of the words "giving protection, indirectly in consequence of neutrality, to the property of the French on the sea." Russia, therefore, as a belligerent, engaged to invite the neutrals to abandon the principle which, when herself neutral, she had exhorted them to maintain. Those of the Powers signatory to the Armed Neutrality Convention of 1780 who accepted the invitation—Prussia, Austria, the Two Sicilies, and Portugal—did therefore expressly abandon the principle. The glamour with which the war had been invested by the Allies, who regarded it as an "occasion of common concern to every civilised State," did not alter the fact that it was a war in which this principle, if it were really founded on natural justice, as they had originally maintained, should have prevailed both for the benefit of the neutrals and of belligerent France. This was the attitude taken by Denmark in answer to the invitation:—

> "Le droit des gens est inaltérable, ses principes ne dépendent pas des circonstances. . . . La nation [*i.e.*, France] existe . . les liens de commerce subsistent aussi. . . . La nation reconnaît encore ses traités avec nous, elle s'y conforme, du moins fréquemment; elle les réclame et nous les réclamons, et cela souvent avec succès non-seulement pour nous, mais aussi pour les effets appartenant aux Puissances en guerre couverts par notre pavillon."

The attitude of France is still more important, because in her answer to Catherine's Declaration she had relied on the alteration of her maritime law in 1778, by which "free ships free goods" had been adopted. The various decrees affecting neutral ships with English goods on board were in direct violation of that principle. Holland very early in the war fell under the dominion of France, and the decrees were made applicable to the Batavian Republic.

Spain, when she joined France, must also be taken to have abandoned the principles she professed in her answer to Catherine's Declaration in 1780. The

United States entered into a treaty with England in 1794, in which seizure of enemy goods on neutral ships was recognised. By the treaty entered into between Great Britain and Russia in June, 1801, the claim that the neutral flag covered enemy goods was renounced, and in 1802 Denmark and Sweden adhered to the treaty.[1]

Assuming that there is anything in the suggestion that the upheaval caused by the French Revolution might justify the abandonment of any principle, a suggestion implied in the Danish despatch with reference to the case of the *Havfruen*—that Russia had only deferred the application of the principles because she was at war—there is a still more important case of abandonment, that of Sweden in 1789 during her war with Russia. She openly renounced the principles of the convention of 1780; and it is said by Manning that Russia tacitly followed her example.[2] This action of Sweden evoked Sir William Scott's caustic remark in his judgment in the *Maria* (1 C. Rob. 340):—

> " The law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent) gives

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[1] The abandonment by the adhering Powers of the principles of the Armed Neutrality is given somewhat differently in a note to Lord Grenville's speech in the House of Lords in 1801, in connection with the Treaty concluded with Russia in that year. The several renunciations were: " By Russia, in her war with Turkey, in 1787; by Sweden, in her war with Russia, in 1789; by Russia, Prussia, Austria, Spain, Portugal, and America, in their treaties with Great Britain during the present war; by Denmark and Sweden, in their instructions issued in 1793, and in their treaty with each other in 1794; and by Prussia again in her treaty with America, in 1799." (*Letters of Historicus*, p. 102.)

This note appears to have been prepared for the published edition of Lord Grenville's speech. The last statements are not accurate. While Denmark, in the instructions issued in 1793, did recognise the right to seize enemy goods on neutral ships, the Swedish instructions did not. The treaty between Sweden and Denmark in 1794, as well as that between Prussia and the United States in 1799, dealt with the question in the spirit of the Armed Neutrality.

[2] *International Law*, p. 268.

> them [*i.e.*, certain speculations and 'loose doctrines of modern fancy'] no sort of countenance; and, until that law and practice are new modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations (which nations may perhaps remember to forget when they happen to be themselves belligerent), no reverence is due to them."

While it is untrue to say, as is so often said, that a principle recognised in many treaties becomes thereby a principle of the Law of Nations, the converse is true, that a principle, even though admitted in many treaties, must cease to have any claim to be a principle of that law when one of its supporters openly denounces it. Whatever merit it may possess as a principle which some nations choose to concede to their potential enemies, whatever may be the number of nations which accede to it in their treaties, all claim to be a natural principle of the Law of Nations, to be an equitable principle which neutrals have a right to insist on at the hands of belligerents, must disappear when it is found that even one of those who most warmly supported it when neutral deliberately abandoned it when it was itself engaged in war.